

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 224 of the Act;)	WC Docket No. 07-245
Amendment of the Commission's Rules and)	
Policies Governing Pole Attachments)	RM-11293
)	
)	RM-11303
,)	

REPLY COMMENTS OF TIME WARNER CABLE INC.

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EXECUTIVE SUMMARY

The best way for the Commission to pursue its objective of advancing broadband deployment and leveling the regulatory playing field is by adopting the Cable Rate as the pole attachment rate used for broadband Internet access service, irrespective of the platform over which such service is provided. The Commission already has applied the Cable Rate to cable operator attachments used for broadband services, and there is wide agreement among the commenting parties that the Commission has latitude under Section 224 to adopt that rate for broadband attachments used by CLECs – latitude that is reinforced by the Commission’s regulatory forbearance authority.

The Cable Rate is just and reasonable. It fully compensates – indeed *overcompensates* – utilities for the costs they incur as a result of third-party attachments; there is no subsidy flowing to cable operators or their customers. To the contrary, further pole-cost “recovery” would amount to a punitive broadband tax that inevitably would impede the deployment and adoption of broadband services.

The Commission should not adopt the Telecom Rate, nor any of the other anomalous rates the electric utilities propose. Of the states that regulate pole attachments, a clear majority has declined to impose any rate premium for broadband attachments. These states recognize that rates based on the Cable Rate methodology are fully compensatory. The decisions of the few outlier states that have concluded otherwise offer this Commission little guidance; these states’ rate methodologies rest on unsound economic assumptions and other idiosyncratic considerations that the Commission should not embrace.

In any event, the Telecom Rate over-allocates costs to third-party communications attachers that do not receive anything close to equal benefit of the pole's common space. Thus, if the Commission applied the Telecom Rate to broadband attachments, it would need first to overhaul the formula to remove glaring cable-to-utility subsidies in the formula's cost and expense elements that have nothing to do with pole attachments.

The Commission, however, should decline to accept any of the utilities' proposed revisions to the Telecom Rate formula, all of which have already been rejected time and again by this Commission. The Commission should not revise its presumptions about the number of attaching parties based on various data submitted by the electric utilities. Those data cannot be accepted at face value, as the data (and related analyses) are routinely disputed by cable operators as erroneous, and for good reason: many errors can and do drive the utilities' entity averages to unrealistically low levels.

Nor should the Commission, in its quest for regulatory parity, ignore the palpable disparity between the rights that cable operators receive under pole license agreements and those that ILECs receive under joint use agreements. The comments confirm that ILECs receive a far more generous suite of rights than cable operators do and the adjustment fees that ILECs pay under joint use agreements reflect their pole ownership rights. When these facets of joint use agreements are taken together, it is clear that the adjustment fees paid by ILECs cannot meaningfully be compared to the pole attachment rental paid by cable operators.

Additionally, the Commission should not accept the electric utilities' allegations of safety violations caused by third-party attachers. In TWC's experience, utilities and other third-party attachers regularly create safety violations that are wrongly attributed to cable operators. The electric utilities' allegations, among other things, frequently stem from deviations from settled accepted practices and standards and newly-minted standards that are not based on any recognized code requirements. Nor do the utilities' allegations – which cannot be verified or fully contested in this rulemaking – manifest any causal connection between third-party attachment practices and pole failures. Certainly, if the electric utilities' claims were as grave as they allege, they would not have waited until this proceeding to vent them; they would have raised them in proceedings requiring them to prove their allegations.

Likewise, the utilities' sweeping allegations of unauthorized attachments must not be accepted at face value in this proceeding. Not only can the utilities' allegations not be meaningfully contested here, the cable operators must routinely dispute identical utility assertions of unauthorized attachments because their numbers of unauthorized attachments are often inflated through seriously flawed pole counts and other shortcomings.

By the same token, the Commission should reject electric utilities' contentions about the pole loading effects of overloading. The information submitted by the electric utilities is misleading and inadequately explained, providing no basis for the Commission to modify its rules. Instead, the Commission should reaffirm its longstanding and pro-

competitive rule that attachers may overlash communications conductors to their own facilities without complying with any specific pre-overlapping permitting procedure.

The Commission should also decline the electric utilities' invitation to vest them with the authority to police and sanction third-party attachers for alleged unauthorized attachments and safety violations without any Commission oversight. Utilities regularly blame cable operators for alleged safety violations that they did not create and that they are not responsible for correcting. As a result, bestowing on electric utilities the authority to act as judge, jury and executioner is a recipe for abuse that inevitably will lead to a spike in pole attachment litigation before the Commission and elsewhere. The Commission itself is the statutorily-designated authority to supervise pole attachment practices, and it has the authority to impose sanctions in egregious cases. There is no reason to give utilities the same power. Should the Commission nevertheless determine that sanctions are warranted, pole owners must not have the authority to impose them and the sanctions must not be paid to the pole owner. Equally important, the Commission must ensure that if there are to be sanctions, cable operators have an ample opportunity to cure any alleged violations before a utility may impose any penalty.

Finally, the Commission should reaffirm two important precedents regarding pole agreement terms and conditions. *First*, the Commission should reaffirm its pro-competitive rule that cable operators are not required to undertake the full utility permitting process before making attachments to drop poles. Such a requirement would impose a needless – but significant – and discriminatory delay on cable operators' ability to deliver service to their subscribers in timely fashion. *Second*, the Commission should

also reaffirm the sign and sue rule as the rule is currently formulated. The Commission should therefore decline to adopt an arbitrary time limit on a cable operator's ability to exercise its rights under Section 224, as proposed in the *NPRM*. Such a time limit is inconsistent with the statute, which obligates the Commission to stamp out unjust and unreasonable pole attachment terms irrespective whether a cable operator acceded to them. And such a rule would inevitably tax Commission dispute resolution resources. Cable operators would have no alternative to seeking to define the bounds of utility terms and conditions before they result in a dispute to prevent a utility from simply waiting for the Commission's time period to expire before imposing abusive interpretations of a pole attachment term or condition.

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ATTACHMENTS:

- Exhibit 1: Declaration of Dr. Coleman Bazelon
- Exhibit 2: American Timber & Steel Rate Sheet
- Exhibit 3: *See Arkansas Cable Telecomms. Assoc. v. Entergy Arkansas, Inc.*, EB-05-MD-004, Reply Decl. of M. Harrelson P.E. (filed June 10, 2005)
- Exhibit 4: *See, e.g., Arkansas Cable Telecomms. Assoc. v. Entergy Arkansas, Inc.*, EB-05-MD-004, Reply Decl. Marc Billingsley (filed June 10, 2005)

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Time Warner Cable Inc. ("TWC") respectfully submits these Reply Comments in response to the Commission's November 20, 2007, *Notice of Proposed Rulemaking* ("NPRM") in WC Docket No. 07-245, published in the Federal Register on February 6, 2008. *See* 73 Fed. Reg. 6879 (Feb. 6, 2008).

DISCUSSION

I. THE COMMISSION SHOULD NOT RAISE POLE ATTACHMENT RATES PAID BY CABLE OPERATORS PROVIDING BROADBAND INTERNET ACCESS SERVICES.

A. The Commission Should Apply The Cable Rate To All Cable Operator Attachments Used For Broadband Internet Access Services.

1. The Cable Rate Is More Than Fully Compensatory; There Is No Reason For A Broadband Tax.

TWC explained in its initial comments that the Cable Rate should continue to apply to pole attachments used to deliver broadband Internet access service. The Cable Rate should apply whether or not broadband Internet access service is commingled with

cable or telecommunications services, because that rate fully compensates utilities for the costs they incur as a result of pole attachments regardless of what kind of communications services the attachments support. *See* TWC Comments at 25-33. This conclusion finds wide support in the filed comments.

The commenters recognize that utility poles are essential, “bottleneck” facilities for cable operators and Competitive Local Exchange Companies (“competitive LECs”) to construct and operate their communications networks over which pole owning utilities wield monopoly control, ^{1/} and that the Cable Rate provides adequate compensation to utilities for pole attachments. *See, e.g.*, Comments of Knology, Inc. at 6 (“[T]he cable rate adequately compensates utilities for the costs of attaching.”); Comments of Time Warner Telecom Inc., One Communications Corp. & COMPTel (“TWTC”) at 3-4 (“The cable rate provides full compensation to pole owners . . .”). Numerous commenters echo the comments of TWC and similarly explain that, because the Commission’s Cable Rate is set at the top of the statutory range of reasonableness, it permits utilities to recover their fully-allocated attachment costs. *See, e.g.*, Comments of NCTA at 9;

^{1/} Comments of Alabama Cable Telecommunications Association; Broadband Cable Association of Pennsylvania; Broadband Communications Association of Washington; Cable Telecommunications Association of Maryland, Delaware & D.C.; Cable Television Association of Georgia; Cable Telecommunications Association of New York, Inc.; Missouri Cable Telecommunications Association; New England Cable & Telecommunications Association, Inc.; Oregon Cable Telecommunications Association; South Carolina Cable Television Association; Texas Cable Association at 16 (“State Cable Associations”); Comments of Charter Communications, Inc. at 7-8; Comments of the National Cable & Telecommunications Association (“NCTA”) at 2-3; *see also* TWC Comments at 18-25; Joint Comments of Alpheus Communications, L.P. & 360 Networks (USA), Inc. at 2; Comments of Fibertech Networks, LLC & Kentucky Data Link, Inc. (“Fibertech”) at 1; Comments of SegTEL, Inc. at 2; Comments of Wow! Internet Cable & Phone at 1; TWTC Comments at 1; Comments of Cavalier Telephone, LLC at 2; Comments of CenturyTel at 2, 5.

Comments of State Cable Associations at 8. These commenters emphasize that courts that have evaluated the Cable Rate formula have uniformly recognized its constitutionality and inherent reasonableness. *See, e.g.*, Comments of State Cable Associations at 16-18; NCTA Comments at 12; Comments of Charter Communications, Inc. at 9; TWTC Comments at 4; CenturyTel Comments at 14;

In fact, comments of both pole users and pole owners alike powerfully demonstrate that the Commission's Cable Rate, as currently implemented, actually *overcompensates* utilities for the actual costs they incur as a result of allowing cable operators to attach to their poles. *See, e.g.*, Comments of AT&T at 18-21 and attached Declaration of Veronica Mahanger McPhee at ¶¶ 31-46; NCTA Comments at 10. The economic analysis submitted by Patricia D. Kravtin as part of Comcast's comments supports this conclusion. Kravtin explains that as a result of cost recovery through the make-ready process, including plant upgrades funded by cable operators over and above rental under the Cable Rate, utilities are likely "*better off* after the accommodation of an additional cable attachment." Kravtin Report ¶ 69 (emphasis in original). Kravtin explains that "[t]he utility receives in excess of the marginal costs it incurs through the combination of make-ready plus the cable rental formula"; "[t]he utility ends up with greater available pole capacity as compared with pre-attachment, because cable attachments place minimal space demands on the pole and poles come in standard heights"; "[m]ore space is available on the pole to accommodate additional uses and/or users for which the utility can realize additional sources of revenue"; and "[t]he utility has the benefit of a newer, stronger pole for its own operations at the cable company's

expense, and can realize savings (or deferred capital expenditures) to its own build-out program.” Kravtin Report ¶ 69. Kravtin therefore concludes that “neither utilities nor their electric ratepayers are worse off as a result of the application of the cable formula rate, and in fact, with make-ready, utilities are more likely better off following an attachment by a third party.” Kravtin Report ¶ 72; *see also* NCTA Comments, Decl. of Dr. Michael D. Pelcovits ¶ 10 (explaining that payment of make-ready charges and recurring rental “make the pole owner better off than before”).

Dr. Coleman Bazelon, in a Report attached as Exhibit 1 to these Reply Comments, provides further economic support for applying the Cable Rate. Although generally supporting Patricia Kravtin’s conclusion that pole owners are no worse off through charging a pole attachment rate based on marginal costs, he also considers how one would properly allocate the costs of the poles’ common space, were one to do so. Bazelon observes that in a hypothetically competitive market for pole attachments, the allocation of the pole costs, including the poles’ common space, would be based on the value of the pole attachment to the attaching parties, including the pole owner, according to principles of Ramsey Pricing. Proxies for that value may be found in the space used on the pole, influenced by the security of the attachment rights, and also considering the relative costs of the common space actually required by the different parties. Cable operators and competitive LECs, Bazelon points out, use only a small percentage of the poles’ usable space, have very limited rights to attach (especially compared to the pole owners and their joint users), and would require much shorter and cheaper poles than do the electric utilities and their joint user incumbent LECs. All of these factors tend to

drive the economically appropriate rate down to the range of the FCC's Cable Rate, or below.

One measure of the value of pole attachments to the attaching parties involves the amount of space used by their attachments. Whereas the Cable Rate formula used by the Commission focuses on the relationship of the space used by the attacher to the "usable space," Bazelon analyzes the amount of space used by the attacher compared to all the "space used." He demonstrates that assuming a 40 foot pole with 16 feet of usable space, the consensus average pole actually used today, ^{2/} if 13 feet of that usable space are actually used, the appropriate allocation of the pole costs would be 7.69 percent – compared to the 7.41 percent allocated by the Commission using the rebuttable presumptions under the Cable Rate. ^{3/} Using such an allocation, Bazelon explains, would actually overstate the value to the cable operator because it does not recognize the insecurity of its attachment rights. He concludes that the Cable Rate is much closer to the economically justified rate than is the Telecom Rate. Furthermore, Bazelon's analysis demonstrates that the Cable Rate allocation of 7.41 percent of pole costs may itself actually overstate the economically justified rate.

^{2/} See AT&T Comments at 19 & MacPhee Decl. ¶ 13; see also *In re Amendment of Rules & Policies Governing Pole Attachments*, 15 F.C.C.R. 6453, 6465, ¶17 (2000) (noting that "a group of electric utilities filed a white paper . . . assert[ing] that over time . . . the average pole height has increased to 40 feet").

^{3/} Were one to continue to use the FCC's assumed 37.5 foot average pole with 13.5 feet of usable space, and were one to assume 12 feet of space used, the allocation to the cable attachment would be 8.33 percent of the total average net pole costs. Assuming one foot for the cable attachment, 2 feet for the incumbent LEC attachments would leave only 9 feet for the electric facilities (including the neutral space) under this scenario, however, which would likely understate the space actually occupied by the electric facilities. See AT&T Comments, MacPhee Decl. ¶ 13 & ¶ 39.

Recognition that the Cable Rate is fully compensatory leads several incumbent LEC utility commenters to advocate applying that rate – or even a lower rate – to pole attachments used to provide broadband Internet access service. These recommendations, coming from telephone utilities that continue to own substantial numbers of joint poles used by cable operators and competitive LECs, are, for that reason, largely disinterested and especially worthy of careful Commission consideration. Expenses that the incumbent LECs save by a lower attachment rate for their own joint use attachment on electric company poles will be largely off-set by lower revenues from cable and competitive LEC attachments to their own poles under their recommendations. The Commission should pay particular attention, therefore, when CenturyTel asserts that the uniform broadband Internet access pole attachment rate should be “set according to the cable TV formula,” which is “reasonable on its face,” Comments of CenturyTel at 14, and when Verizon asks the Commission to “adopt a uniform rate formula that will produce the lowest possible rate that would bring about competitive parity.” Comments of Verizon at 6.

AT&T, in turn, requests the Commission to modify its current pole attachment methodologies in ways that would result in a rate *lower* than the current Cable Rate. AT&T Comments at 19-21. Specifically, AT&T requests that the Commission:

- Allocate attachment costs by “distributing space on a 40-foot standard jointly occupied pole” *Id.* at 19.
- Require attachers to pay their share of pole costs based their use of usable space as a percentage of the pole’s total usable space. *Id.*

- Modify its pole attachment methodology by considering only the net average cost of a standard 40-foot Class 5 wood pole in calculating pole attachment rates.” *Id.* at 20.
- Remove the actual costs of non-pole-related fixtures or appurtenances from bare pole costs. *Id.*
- Exclude capital reimbursements (such as contributions in aid of construction) from the pole costs. *Id.*
- Include only the annual expenses directly associated with a shared pole in calculating the rate. *Id.* at 21.

These proposals reflect AT&T’s view that poles “are in the nature of a public trust” and that pole attachment rates should be calculated “based on an accurate reflection of the benefit of attachment.” *Id.* at 21.

Given that the Cable Rate fully compensates, indeed overcompensates, utilities for cable operator attachments to their poles, the comments demonstrate that raising pole attachment costs for broadband Internet access providers would impose a “tax” that would discourage the deployment and adoption of advanced communications services. ^{4/} See Pelcovits Decl. ¶¶ 24-31 (explaining that increased pole attachment rates will lead to higher prices for consumers, reduced availability of broadband services, and reduced investment in plant and technology). For example, Comcast explains that “new taxes such as the pole rate increase” proposed in the *NPRM* will harm cable operators’ ability to introduce facilities-based voice competition through the roll out of cable Voice over Internet Protocol telephony because it “will impose an immediate system-wide penalty on cable operators that offer broadband VoIP services.” Comcast Corp. Comments at 34.

^{4/} See, e.g., Charter Comments at 10; Comcast Comments at 33-35; Comments of the Mississippi Cable Telecommunications Association at 2-3.

Along these same lines, Charter Communications explains that increasing broadband providers' pole attachment costs will deter investment in and deployment of advanced communications services, including cable VoIP, in rural areas. *See* Charter Comments at 2-7; *see also* Comments of the Mississippi Cable Telecommunications Association at 2-3. Based on empirical data, Charter Communications – “which has extensive experience operating cable systems in rural communities” – concludes that “[t]he impact of an FCC broadband tax in rural areas would be devastating given the already higher costs in rural areas.” Charter Comments at 2, 4.

In view of these significant harms, the Commission should refrain from raising pole attachment rates on broadband service providers – especially where the Cable Rate fully compensates utilities for all of their costs incurred as a result of attachment.

2. *The Cable Rate Contains No Subsidy for Cable Operators, And Utilities Provide No Economic Evidence Otherwise.*

TWC's comments explained that the Commission's suggestion that the Cable Rate subsidizes cable operators or their subscribers is mistaken because that rate allows utilities to recover a fair proportion of their fully-allocated costs of pole attachment. *See* TWC Comments at 25-35. Numerous comments, including those of several incumbent LEC utilities, support this conclusion. ^{5/}

The pole-owning electric utilities argue otherwise, asserting that the Cable Rate subsidizes the cable industry at the expense of their ratepayers and shareholders. *See, e.g.,* Concerned Utilities Comments at 7-25. But they fail to provide any economic analysis

^{5/} *See, e.g.,* NCTA Comments at 12-13; Comcast Comments at 12-19; State Cable Association Comments at 4; Charter Comments at 8-9. *See supra* at 6-7.

explaining how the Cable Rate in fact subsidizes the cable industry. Nor do these utilities even point to any particular costs that they are forced to incur as a result of cable operator pole attachments for which they are not currently compensated under the Cable Rate.

For the Cable Rate to actually contain a subsidy for cable operators, the rate methodology must fail to account overall for costs that utilities incur as a result of pole attachments. Kravtin makes this clear. *See* Kravtin Report ¶ 67. She explains that, “[w]hile economists may disagree on many things, there is perhaps one central tenet upon which there is solid agreement, and that is the notion that rates that recover the marginal costs of production are economically efficient and subsidy free.” *Id.* For a subsidy to exist, by contrast, “a utility must have unrecovered costs that *but for* the attacher would not otherwise exist.” *Id.*

The comments demonstrate that the Cable Rate does not meet the definition of a subsidy: they make clear that there are no costs that the utilities fail to recover under the Cable Rate, for that rate entitles the utilities to recover all of their marginal costs of pole attachment through the make-ready process *as well as* a fully-compensatory rental rate. ^{6/} As the State Cable Associations explain, for example, “[t]he rental paid by cable operators . . . reimburse the utilities for all the costs incurred for hosting third-party attachments, **plus** a proportionate share of the costs of all poles (even those purchased by the operator through make-ready), **plus** a share of all pole-related administrative and maintenance expenses, **plus** depreciation, taxes, and even a reasonable profit.” State Cable Associations Comments at 4.

^{6/} *See, e.g.*, Charter Comments at 8; NCTA Comments at 12; State Cable Associations at 4; Comcast Comments at 15-19.

As a matter of basic economics, there cannot be a subsidy embedded in the Cable Rate for the cable operators. Kravtin explains that the Cable Rate is not a subsidized rate because it not only allows utilities to recover their “but for” costs through the make-ready process, but allows them to charge rent – even on poles that the cable operators have purchased as part of make-ready. *See* Kravtin Report ¶¶ 68-72; *see also* Pelcovits Decl. ¶¶ 6-10. 7/

In the face of this basic economic truth, a consortium of electric utilities – self-styled the “Concerned Utilities” – nevertheless asserts baldly that cable operators are inherently subsidized by pole-owning utilities because cable operators benefit from pole infrastructure that they do not initially have to undertake to construct and, moreover, the plant that utilities initially construct is made more expensive through “hidden” operating and maintenance costs incurred in accommodating communications attachers. *See* Concerned Utilities Comments at 22-25. Both components of this argument are seriously flawed. *First*, there simply is no evidence that utilities, as a matter of course, construct their plant to accommodate communications pole attachments. *See* Comments of Knology, Inc. at 6 (“When determining which size of a pole to install, utilities, not

7/ In this same regard, the comments make clear that the Commission’s suggestion that the Cable Rate contains a hidden subsidy because it does not account for unusable pole space is fundamentally incorrect – indeed, “flat-out wrong.” State Cable Associations Comments at 12. Commenters explain that the Cable Rate requires cable operators to pay a proportionate share of the costs of the entire pole, including usable and unusable space. *See, e.g.,* Comcast Comments at 13-14. The comments emphasize, moreover, that this point has been recognized time and again by the Commission itself. *See* State Cable Associations Comments at 12; *see Amendment of Commissions Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. 12,103, ¶ 53 (2001); *Alabama Cable Telecomm’s Ass’n v. Alabama Power Co.*, 16 F.C.C.R. 12,209, ¶ 55 & ¶ 60 (2001).

attachers, determine how much usable space there will be.”). The Concerned Utilities do not offer any evidence to support their claim. ^{8/}

Second, the idea that cable operators receive the same benefit from “piggybacking” on utilities’ poles as if they were to construct their own pole plant, which it has long been recognized they *cannot* do, is seriously misguided. *See* TWC Comments at 18-21. For one thing, cable operators are allowed to attach only if there is sufficient, excess capacity, and they may be denied the right to attach for reasons of “capacity, safety, reliability, and [generally applicable] engineering standards,” ^{9/} or where the utility has a “bona fide development plan” that calls for future use of the pole space. ^{10/}

^{8/} This claim is further suspect for two other reasons. Importantly, the frequency of make-ready work and the millions of dollars in make-ready charges that cable operators annually pay to utilities seriously undermines the notion that utilities routinely build plant with communications attachers’ needs in mind. *See* Knology Comments at 21 (noting that charges in excess of \$530,000 “were merely a small fraction of the total make-ready costs that [a] utility charged to [it] for [a] single market”). As NCTA points out, “[f]or some utilities make-ready generates millions of dollars in payments annually.” NCTA Comments at 10. Moreover, as noted by pole-owner AT&T, the electric utilities require more pole space to accommodate their own – not communications attachers’ – needs. *See, e.g.,* AT&T Comments at 5 (“[I]n order to accommodate the equipment necessary to provide the increasingly higher voltage required to serve their customers, the effective space utilization of poles by [electric utilities] has increased from 4 feet in the 1970s, to anywhere from 8 feet to 12 feet today.”).

^{9/} 47 C.F.R. § 1.1403(b).

^{10/} *Implementation of Local Competition Provisions in Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 16,078, ¶ 1169 (1996) (“We will permit an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service.”); *see also Southern Co. v. FCC*, 293 F.3d 1338, 1348 (11th Cir. 2002) (“The FCC guideline require[ing] a ‘bona fide development plan’ as a prerequisite to a utility’s reservation of space for its future needs is a reasonable exercise of agency discretion.”).

For another, as the comments make clear, cable operators making pole attachments under license agreements do not enjoy anywhere near the same rights as pole owners. ^{11/} For example, even when a cable operator pays for a utility to install a taller, stronger pole to accommodate its attachment, the utility owns that pole and, notwithstanding that the cable operator paid for it, the cable operator is required to pay rent to attach to it.

Where a cable operator is required in the make-ready process to replace poles in order to create sufficient room for its attachment, therefore, the utility – not the cable operator – receives all the benefits. And those benefits are substantial. By receiving a newer, stronger pole for free from the cable operator, the utility can defer its own capital expenditure and therefore realizes a cost savings. *See Comcast Comments at 19; see also Kravtin Report ¶ 69.* The utility also receives greater pole capacity than it had before, from which it may, among other things, derive additional revenue. *See Comcast Comments at 19; see also Kravtin Report ¶ 69.* At the same time, the cable operator has rights no greater than a mere licensee, which are considerably less than the rights of the pole owner or any joint users. It is hard to see the “beauty” for cable operators in such a scheme. *See Concerned Utilities Comments at 22.*

3. *There Is A Broad Consensus Among Commenters That The FCC May Apply The Cable Rate To Commingled Broadband Internet Access Attachments.*

In its comments, TWC explained that the Commission has statutory authority to apply the Cable Rate to pole attachments used by competitive LECs as well as cable operators to provide broadband Internet access service commingled with other

^{11/} *See, e.g., Comcast Comments at v & 24-28; see also infra 36-38.*

communications services. *See* TWC Comments at 44-47. A clear majority of commenters, including a large number of pole-owners, agree with TWC's fundamental premise that the Commission enjoys wide discretion under Section 224(b) to apply the Cable Rate to commingled pole attachments used to provide broadband Internet access service, a service for which the statute supplies no specific rate. ^{12/} As did TWC in its comments, these commenters recognize that the Supreme Court in *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 435 U.S. 327, 229 (2002), affirmed the Commission's reliance on its authority under Section 224 to establish a pole attachment rate for a communications service not treated by the statute – cable service commingled with Internet access service. ^{13/} As AT&T explains, for example, the Commission's "expansive" authority under Section 224(b)(1) "extends not only to the statutorily established rate formulas applicable to pole attachments of cable operators . . . and non-incumbent telecommunications carriers . . . but also to whatever rates the Commission deems appropriate to promote the deployment of other services such as broadband Internet Access." AT&T Comments at 22. AT&T concludes that "[t]he Commission's establishment of a uniform rate for pole attachments used for broadband Internet access service would be a fully warranted exercise of the Commission's expansive regulatory authority under section 224 as endorsed by the Supreme Court in *NCTA*." *Id.* at 24. That

^{12/} *See, e.g.*, AT&T Comments at 23; Comments of Knology, Inc. at 5-6; State Cable Associations at 19-22; *see also* note 14.

^{13/} *See, e.g.*, AT&T Comments at 23; Comments of Verizon at 6-16; Initial Comments of Florida Power & Light & Tampa Elec. ("FP&L and TECO") Regarding ILECS and Pole Attachment Rates at 12; Comments of Alabama Power, Georgia Power, Gulf Power & Mississippi Power ("Alabama Power et. al") at 15-16.

conclusion, supported by other pole owners such as CenturyTel, *see, e.g.*, Comments of CenturyTel at 14; Qwest Comments at 4; Verizon Comments at 11-14, is undoubtedly correct.

Even many electric utilities agree with the fundamental point that the Commission has broad discretion under Section 224 – as confirmed by the Supreme Court in *Gulf Power* – to adopt a uniform rate for all pole attachments used to provide broadband Internet access. ^{14/} In their comments, a number of these utilities indeed argue that the Commission is not required to apply the Telecom Rate to attachments involving broadband Internet access service, even where commingled with traditional circuit-switched telecommunications services. ^{15/} In advocating a uniform rate for pole attachments used for broadband services set above the current Telecom Rate, for example, the Coalition of Concerned Utilities explains that, just as “[t]he Commission is . . . free to establish a broadband rate for cable systems that is just and reasonable although different from the rate that applies to cable systems providing only cable service,” it is likewise “free to establish a rate for telecommunications carriers providing broadband service that

^{14/} *See, e.g.*, Comments of the Utilities Telecom Council (“UTC”) at 13-14; Comments of Ameren Services Co. & Virginia Elec. & Power Co. (“Ameren et al.”) at 19-22; Comments of PacifiCorp, Wisconsin Elec. Power Co. & Wisconsin Pub. Serv. Corp. (“PacifiCorp. et al.”) at 14; Comments of the Coalition of Concerned Utils. at 37-39; Comments of the Edison Electric Institute & the Utils. Telecom Council (“EEI/UTC”) at 96-98; Comments of FP&L and TECO at 12-13; Comments of Alabama Power et al. at 15-16. *See also* Comments of Verizon at 6-16; Comments of CenturyTel at 14; Comments of the United States Telecom Association at 13-15; Qwest Comments at 4-5.

^{15/} *See, e.g.*, Comments of Ameren et al. at 23-27; Comments of PacifiCorp et al. at 14-15; Comments of Verizon at 15; Comments of CenturyTel. at 14; Qwest Comments at 4-5.

is different than the rate specified for telecommunications carriers providing telecommunications service alone.” Comments of Concerned Utils. at 39.

Because the Cable Rate fully compensates, indeed even overcompensates, utilities for the fully-allocated costs of pole attachments, the Commission should exercise its well-recognized broad discretion in this rulemaking to apply that rate – not the Telecom Rate, or any other rate – to pole attachments used by cable operators and competitive LECs to provide broadband Internet access service. *See* TWC Comments at 44-47.

4. *The Commission’s Forbearance Authority Further Supports Application Of The Cable Rate To Pole Attachments Used For Broadband Internet Access By Competitive Local Exchange Carriers.*

The Commission’s ability to rely on its broad discretion under Section 224 to apply the Cable Rate to pole attachments used by competitive LECs to provide broadband Internet access service commingled with telecommunications service is further supported by principles of forbearance. The Commission has statutory authority to forbear from applying regulations, *see* 47 U.S.C. § 160, including any regulation that stands in the way of timely universal broadband deployment. ^{16/} The Commission has not hesitated to invoke its forbearance authority to relieve telecommunications carriers of burdensome regulations that hindered competition. ^{17/}

^{16/} 47 U.S.C. § 157 note (“The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest . . . regulatory forbearance measures.”).

^{17/} *See, e.g.,* Petition for Forbearance of the Verizon Tel. Cos. Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance

As in those cases, it would be appropriate to forbear from applying the Section 224(e) Telecom Rate to telecommunications carriers providing telecommunications service commingled with broadband Internet access service in this proceeding. As the comments make clear, application of the 224(e) Telecom Rate is not necessary to ensure just and reasonable charges.^{18/} Rather, forbearance from applying the Telecom Rate would promote reasonable charges for broadband Internet access service by incenting competitive local exchange carriers to provide broadband services.^{19/} It is not necessary to apply the Section 224 Telecom Rate to protect consumers, because forbearance will stimulate competition and therefore ultimately benefit consumers.^{20/}

Finally, forbearance from application of the Section 224(e) Telecom Rate would advance the public interest. By creating rate parity among providers of like communications services, *NPRM* at ¶26 & ¶36, forbearance would “promot[e] competitive market conditions.” *See* 19 F.C.C.R. at 21,508, ¶34. It would also “promote the timely and comprehensive deployment of broadband facilities,” 47 U.S.C. 157 note,

Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), 19 F.C.C.R. 21,496 (2004).

^{18/} *See supra* at 1-8.

^{19/} *See* 19 F.C.C.R. at 21,508, ¶ 25 (“In light of the competitive benefit of the BOCs’ continued investment in fiber-based broadband facilities, the disincentives associated with regulated broadband unbundling under section 271 support our decision to grant forbearance from those requirements. We conclude that removing those disincentives will promote just and reasonable charges and practices through the operation of market forces.”); *see also* 47 U.S.C. 224(a)(1).

^{20/} *See* 19 F.C.C.R. at 21,511, ¶ 31 (“[W]e believe that forbearance from these requirements will provide an increased incentive for the BOCs to deploy broadband services and compete with cable providers, which will in turn increase competition and benefit consumers.”); *see also* 47 U.S.C. § 224(2)-(3).

by eliminating disincentives to investment. 21/ These effects would ultimately inure to the benefit of consumers.

B. The Commission Should Not Adopt The Telecom Rate For Pole Attachments Used To Deliver Broadband Internet Access Service.

1. The Telecom Rate is Not Supported Economically For Parties That Do Not Require Poles As Large And Expensive As The Electric Companies And Their Joint Users Require.

The utilities fail to provide any economic support for applying the Telecom Rate to pole attachments used to provide broadband Internet access service. There are, on the other hand, strong economic reasons for declining to apply that formula to attachments of cable operators and competitive LECs which are used to provide broadband Internet access service. Cable operators' and competitive LECs' pole requirements, including common space needs, pale by comparison to those of the electric utilities. The electric utilities must use taller, stronger poles with a larger diameter to support their heavier facilities that must start higher on the pole to meet the NESC's minimum grade requirements and that take up much more space. 22/ As confirmed by AT&T, a joint

21/ See 19 F.C.C.R. at 21,508, ¶¶ 33-34 ("relieving the BOCs of unbundling obligations will encourage BOCs to further invest in, and deploy broadband technologies. In turn, we believe these investments will promote increased competition in the market for broadband services").

22/ The NESC requires that electric conductors be strung from one foot to as many as five feet higher on poles than communications conductors to meet ground clearance requirements. See National Electrical Safety Code Table 232-1 (IEEE 2007). Furthermore, the placement of facilities higher on a pole will, as a matter of simple physics, require that the pole be stronger at the point where it meets the ground to withstand the greater stress created by the higher facilities. And, of course, the greater number of electric attachments at that higher height also increases the stress on the pole from the weight of the facilities and the potential stresses from wind and ice-loading. See

pole owner and joint user, electric utilities typically require at least 40 foot, Class 5 poles to provide capacity for both electric purposes and their incumbent LEC joint users. AT&T Comments, MacPhee Declaration ¶ 40. By contrast, cable operators, whose facilities do not need to be as far above the ground to meet NESC requirements and who require only a single foot of space, could make do with shorter and smaller-diameter, 25 foot poles. Those poles – and their respective common space – would be much cheaper than the 40 foot Class 5 poles that the utilities and time joint users must use to provide service. In fact, one pole vendor charges approximately 3 times more for a 40 foot, Class 5 pole than for a 25 foot, Class 5 pole, and apparently 4 times more than for a 25 foot, Class 7 pole. *See American Timber & Steel Rate Sheet*, attached hereto as Exhibit 2.

Given the difference in the needs between cable operators and electric utilities when it comes to the common space on poles, the Telecom Rate formula, as it is currently designed, significantly over-allocates costs to cable operators. As TWC explained in its initial comments, the apartment building analogy used in the legislative history of the Pole Attachment Act underscores the problem with the way that the Telecom Rate formula allocates common costs. *See TWC Comments* at 42. Unlike the Cable Rate, the Telecom Rate would divide the costs of the common spaces of the building – such as the lobby and the parking garage – pro rata, according to the total number of families that rent apartments. As a result, a family that rents only one apartment would pay the same pro rata allocation of common costs as other families that occupy multiple apartments.

Re. Consumers Power Co., 1997 WL 107296 *13 (Mich. PSC) (“The record indicates that the minimum ground clearance requirement for electric lines averages about four feet higher (measured from the ground) than communications lines.”).

While the Telecom Rate does reduce the portion of the cost of the overall common space that is allocated to the cable operator by one-third, this is clearly insufficient to compensate for the fact that the common costs necessary to meet the needs of the electric utility and its incumbent LEC joint user are far greater than the common costs that would be necessary simply to meet the cable operator's own needs, and that the cable operator occupies far less pole space than other attachers. ^{23/} At the very most, this one-third reduction compensates in part for the fact that cable operators enjoy far fewer rights under pole attachment license agreements than the pole-owners or joint users. *See infra* at 36-38.

The unfairness of applying the Telecom Rate to cable operators is also apparent when one considers that the electric companies use as much as eight to twelve feet of the usable space on the pole for their attachments, and the incumbent LEC joint user uses from 1 1/2 to 3 feet. *See* Comments of AT&T, MacPhee Decl. at ¶¶ 13-14. To suggest that all three attaching parties get an equal benefit from the pole's common space is ludicrous. *See, e.g.,* PacifiCorp et al. Comments at 11 (arguing "all attaching entities share equally in the use of the 'unusable' (or common) space on the pole"); Concerned Utilities Comments at 11-12 (arguing common space "benefits utility and non-utility attachments alike"); EEI/UTC Comments at 17 (arguing "each provider that occupies space on the pole has an equivalent need for the common space on the pole"); Comments of Empire District Elec. Co. at 2 (asserting cable operators have equal need of common

^{23/} 47 U.S.C. § 224(e).

pole space); Alabama Power et al. Comments at 23 (“usable space of a pole . . . equally benefits all attaching parties”).

As pointed out by Coleman Bazelon in Exhibit 1 to these Reply Comments, it is not appropriate to allocate common costs by an equal division of those costs where the parties use differing amounts of the good. Where one party uses a greater quantity of the good, an equal division of costs amounts to a “quantity discount.” Bazelon Decl at 27. The quantity discount in the Telecom rate is severe in light of the fact that the incumbent LEC uses 1.5 to 3 times as much space as does the cable operator, and the electric company uses 8 to 12 times as much. There is no justification for such a quantity discount for use of pole attachment space. Furthermore, giving the pole owner and its joint user any kind of a discount is especially uncalled for where, as here, those parties already have the significant advantage of enjoying greater rights related to attachment.

2. *If The Commission Determined To Apply The Telecom Rate To Broadband Attachments It Would Have To Modify The Current Formula.*

To the extent that the Commission were to consider applying the Telecom Rate formula (which, again, we believe unjustified), the Commission would have to adjust that formula to recognize that there are substantial cost and expense elements that have little to no relationship to costs associated with pole attachments, effectively providing a subsidy from cable operators to pole owners. ^{24/} Consistent with the modifications to

^{24/} These same elements also exist in the Cable Rate formula and the Commission could justify their removal from that formula as well, but for the purposes of these Reply Comments, Time Warner Cable at this time urges their removal only from the Telecom Rate. See 47 U.S.C. § 224(e); 47 C.F.R. § 1.1409(e)(2).

costs under the Telecom Rate advocated by AT&T and Time Warner Telecom, ^{25/} the Commission should remove these cost and expense elements from the Telecom Rate formula. The result would be a rate that is closer to the constitutional and just and reasonable rate produced under the Cable Rate methodology.

AT&T points out that the Commission's reliance on the average cost of all poles in FERC account 364 (Poles, towers and fixtures), the principal asset account used in the FCC's rate formulas for electric utilities, allows the utility to recover the costs of an average pole that is considerably more expensive than the actual average pole to which cable operators are generally attached. *See* Comments of AT&T, MacPhee Decl. at ¶¶ 37-40. Account 364 for most utilities contains the investment in numerous poles that are 50-60 feet tall (and taller) and much more expensive than the 35-40 foot distribution poles and the 25-30 foot drop poles used by cable operators. *See* Exhibit 2. The formula thus contains a disconnect between the average size pole used for purposes of determining usable space – a 35 to 40 foot pole – and the larger, and more expensive, average size distribution pole contained in Account 364. Were the Commission to consider applying the Telecom Rate to cable operators offering broadband Internet access, it should adjust the formula to more closely approximate the cost of the actual poles to which cable is attached.

^{25/} See *supra* at 6-7; see also Time Warner Telecom, Inc., White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecomms. Servs., filed Jan. 16, 2007, at 17-19.

In addition, Account 364 typically contains appurtenance investment significantly greater than the 15 percent assumed by the Commission's formula. Account 364 contains such items as permits to build poles in rights-of-way ("ROW"), guys and anchors and long lists of equipment and devices that bear no relation to the attachment of a cable wire to the pole. *See* 18 C.F.R. Pt. 101 (Account 364). Yet, most pole attachment agreements specifically require cable operators to disclaim any ability to utilize the utilities' underlying right-of-way and requires the cable operator to offer proof of ROW authorization. Furthermore, the utilities' guys and anchors primarily support their overhead conductors and other equipment they place on the poles, such as transformers and street lights, while their pole attachment agreements require cable operators to install their own guys and anchors to support their own overhead facilities. Although the District of Columbia Circuit has held that the utilities' guys and anchors should be considered as pole-related, ^{26/} the Commission has since recognized that they also support the utilities' overhead plant, and that the concept of spreading the costs of the utilities' investment in guys and anchors among poles and overhead plant investment "has some merit." ^{27/} The Court of Appeals also recognized that it might be appropriate to credit cable operators for their own investment in guys and anchors to the extent that

^{26/} *See Alabama Power Co. v. FCC*, 773 F.2d 362, 369 (D.C. Cir. 1985).

^{27/} *In re. Amendments of Rules & Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 F.C.C.R. 4387, 4406 n.20 (1987). The Commission did not amend its formula to spread the investment in guys and anchors among other investment accounts primarily because some utilities do not maintain records of their investment in guys and anchors. *Id.* There is no reason, however, why the Commission could not estimate the relative benefit of guys and anchors to this other investment and increase the so-called "appurtenance deduction" accordingly.

they provide some stability to the pole. ^{28/} However the Commission chose to more accurately estimate the percentage of Account 364 that is “pole-related,” it is clear that some such adjustment would be necessary were the Commission to apply the Telecom Rate to attachments used for broadband Internet access. *See* Comments of AT&T, MacPhee Decl. at ¶ 42; Time Warner Telecom, Inc., *White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecomms. Servs.*, filed Jan. 16, 2007, at 17-19.

As to expenses, there are entire buckets of items that have no conceivable bearing to cable attachments on utility poles. For example, the Commission’s formula permits broad recovery of a diverse array of administrative accounts that include such “overhead” as executive salaries and bonuses, automobile services, legal department expenses and attorneys fees, insurance premiums, compensation for injuries, advertising, certain R&D expenses, and many others too numerous to list here. *See* 18 C.F.R. Pt. 101 (Accounts 920-931 & 935).

Utilities also are allowed to factor in the full amount of FERC Account 593 as part of their rate. Account 593 is not the *pole* maintenance account but, is entitled “Maintenance of *overhead lines*.” 18 C.F.R. Pt. 101 (Account 593) (emphasis added). The account description specifies that it “shall include the cost of labor, materials used and expenses incurred in the maintenance of overhead distribution line facilities, the book cost of which is includible in account 364, Poles, Towers and Fixtures, account 365, Overhead Conductors and Devices and account 369, services.” *Id.* Account 593 applies

^{28/} *See Alabama Power Co.*, 773 F.2d at 369 n.14.

to maintenance items in the pole account (Account 364, which also includes towers and fixtures), *see id.*, but also to overhead conductors and devices (Account 365), which include wires and devices (such as circuit breakers, mechanical switches, lightning arresters and ground wires) used in *conducting* electricity. *See id.* Account 365. Moreover, the utility is permitted to book into the 593 maintenance account – and include in the pole rate – expenses associated with maintaining service drop wires. But the very nature of a utility’s overhead lines and services – passive conductors, active devices, associated hardware, all in service to facilitate the distribution of high voltage (and inherently dangerous) electrical energy – requires much more maintenance and proportionally much greater maintenance expenses than do poles.

Evidence of the significant overstatement of the cost of “pole” maintenance in the FCC’s Telecom Rate for electric utilities is found by review of the amounts for pole maintenance found in the FCC’s Telecom Rate for telephone company poles. According to telephone company pole maintenance records, the rate for telephone poles is based on maintenance *solely of the poles*. These records reflect that the pole maintenance is much less than that derived by the Telecom Rate formula applied to electric companies.

The amounts that utilities are permitted to recover under both the taxes and depreciation components of the carrying charges are likewise overly generous. As to taxes, pole owners are allowed not only to include federal, state and local income taxes “which relate to utility operating income,” 18 C.F.R. § Pt. 101 Account 409.1, but also taxes “other than income taxes which relate to utility operating income.” *Id.* (Account 408.1). These taxes do not relate directly to the pole attachment income, and should not

be counted. Depreciation is another area where utilities are permitted to recover charges, with respect to poles at least, which have little bearing on the actual service life of in-ground assets. *See* TWTC Whitepaper at 19-20.

All this leads to this inevitable question: why should a pole owner be permitted to include costs for items that have no realistic connection to the utilities' pole attachment service? ^{29/} Removing these costs would bring the rate produced under the Telecom Rate formula more in line with the constitutionally-permissible and fully-compensatory rate produced using the Cable Rate.

3. *The Consensus View Among States That Regulate Pole Attachments Is That The Cable Rate Properly Applies To Commingled Attachments.*

The comments filed in this proceeding emphasize an overwhelming trend among the States that regulate pole attachments: The States have largely adopted rate formulas based on the Commission's Cable Rate. *See* TWTC Comments at 7-8 & 14 (explaining that the "most important trend among the states that have exercised reverse preemption

^{29/} Consider one 2007 electric rate case decision in which certain expenses attracted the regulator's attention and were resoundingly rejected. *See Application of Entergy Arkansas, Inc. for Approval of Changes In Rates for Retail Elec. Serv.*, APSC Docket No. 06-101-U (June 15, 2007). In an order released June 15, 2007, the Arkansas Public Service Commission refused to allow Entergy to recover more than \$100 million in costs that it sought to impose on retail electric customers in Arkansas. Some of the costs it sought to recover were associated with past storm recovery efforts, *see id.* at 46-47, executive compensation and perquisites for executives at Entergy's corporate parent and for Entergy Arkansas' President and CEO. *Id.* at 69. The Arkansas PSC also disallowed expenditures for other items that Entergy asserted were necessary to 'maintain relationships, increase dialogue, disseminate information and 'recruit assistance . . . to support Economic Development efforts,' " including expenditures for alcohol, country club memberships, symphony and Kid Rock concerts, cookies, buck knives, bath products and functions and dinners for political figures. *Id.* at 71-72. Entergy ultimately admitted it sought to recover costs not properly booked to utility accounts.

over pole attachment regulation is that a majority have adopted a single rate” that is “based on the FCC’s cable rate formula”). ^{30/} Indeed, the commenters explain that the States that have expressly considered the issue have uniformly refused to apply the Commission’s Telecom Rate at all, including to pole attachments used for broadband services. ^{31/} As the Michigan Public Service Commission stated in 1997 in response to requests by electric utilities to apply the FCC Telecom Rate formula:

The argument advanced by Consumers [Power] and Detroit Edison, that the pole length not directly used for attachments is a necessary part of the pole’s structure, while literally true, begs the question of how to allocate costs for the entire pole among multiple users. A cost allocation based upon usable space is a reasonable basis for assigning each user an equitable share of the entire cost responsibility. . . . With respect to Consumers’ argument that the federal Telecommunications Act of 1996 increases the attaching parties’ allocation of pole costs, the Commission finds that future changes in the FCC standard are not controlling in these cases and are not persuasive for purposes of setting current pole attachment rates.

Re Consumers Power Co., 1997 WL 107296 *13 (Mich. PSC Feb. 11, 1997).

The number of States that have refused a rate hike for pole attachments used to deliver advanced and broadband services – including California, Connecticut, Alaska and New York – have done so for sound reasons. ^{32/} See Comcast Comments at 22-23; State

^{30/} See also State Cable Association Comments at 23-30; Comcast Comments at 21-23.

^{31/} See also Oregon Public Utility Commission Comments at 3 (“All attachers in Oregon, including broadband Internet access service providers, are subject to the same pole attachment rate formula,” which is “a modified version of the federal cable rate formula”).

^{32/} See *Petition of the United Illuminating Co. for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Sys. Providing Telecomm. Servs. & Internet Access*, Docket No. 05-06-01 (Conn. D.P.U.C., rel. Dec. 14, 2005); *Consideration of Rules Governing Joint Use of Utility Facilities & Amending Joint-Use Regulations Adopted under 3 AAC 52.900 – 3*, 2002 WL 32830485

Cable Associations Comments at 23. These States have recognized that the Cable Rate adequately compensates pole owners for communications attachments. Given that new services impose no added burden on the pole, a rate increase would simply tax the Internet to the detriment of facilities-based competition and broadband deployment. *See* Comcast Comments at 22-23; State Cable Associations Comments at 23. *See also* TWC Comments at 35-39.

These States' pole attachment rate decisions are "compelling precedent" for the Commission in this proceeding as it considers whether pole attachment rates subsidize pole attachers at the expense of utility ratepayers and shareholders. *See* Comcast Comments at 22. For States that regulate pole attachments must consider "the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services." 47 U.S.C. § 224(c)(2)(B); 47 C.F.R. § 1.1412(a)(2). Under this dual mandate, certified States have "found no subsidies result from the cable formula and that the lower pole rate will encourage broadband and VoIP deployment and competition." Comcast Comments at 22. This Commission – whose own mandate is to promote advanced services and not the interests of utility ratepayers or shareholders – should reach the same conclusion.

(Alaska R.C., Oct. 2, 2002); *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments & to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Cos.*, 2002 N.Y. PUC LEXIS 14, (rel. January 15, 2002); *Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Serv.*, D. 98-10-058, 1998 WL 1109255 (Cal. PUC rel. Oct. 22, 1998).

4. *The Commission Should Not Look To Outlier States for Rate-Making Guidance.*

The Commission also should decline the electric utilities' invitation to adopt a broadband attachment rate based on the peculiar formulas adopted by the small number of pole-regulating jurisdictions that have deviated from the Commission's cable rate methodology. *See, e.g.*, Concerned Utilities Comments at 25-36. These anomalous rates provide little guidance to the Commission in setting an appropriate rate for pole attachments used to provide broadband services. The City of Seattle's rate – adopted in an ordinance – determined the rate that attachers would pay to *its own utility company*, the Seattle City Light Department. *See* Seattle Ordinance No. 118540. The rate that Seattle charges to attach *to its own poles* hardly suggests a disinterested decision or an appropriate rate for the Commission to adopt for communications attachers to poles owned by investor-owned utilities. *See id.*

By the same token, the utilities' reliance on the rate adopted by the Indiana Utility Regulatory Commission's decision in *United Telephone Co. of Indiana, Inc. v. Kankakee Valley Rural Elec. Membership Corp.*, Cause No. 42755, at 2006 WL 1545086 (Mar. 22, 2006), is also mistaken. That decision dealt only with the rental rates charged to Sprint and AT&T by a cooperatively organized electric utility, and both incumbent local exchange carriers proposed rate formulas different from either of the FCC's formulas. In fact, the Regulatory Commission expressly declined to apply the rate to other situations: “[W]e make no actual or implied finding that the compensation/other condition determinations made in this Order are necessarily applicable to other, non party attachers” 2006 WL 1545086 at *15. As the Indiana Commission explained, “we

cannot assume that all relevant facts pertaining to any such other attachers and [the utility] would be the same as those presented in this proceeding.” *Id.* 33/ In any event, Indiana does not even regulate pole attachment rates for the entities over which this Commission has jurisdiction, namely, cable operators and CLECs.

The rate formulas adopted by Delaware and Maine, both of which were adopted before the 1996 Telecommunications Act and differ from the Commission’s formulas in the allocation of annual pole costs to attachers, are also faulty methodologies, inappropriate for the Commission to use in adopting a rate for broadband attachments. Insofar as these formulas allocate more responsibility for pole costs under the concept of avoided costs, or stand-alone costs, they betray flawed “economic reasoning,” which the Commission has properly rejected in the past. 34/ Kravtin Decl. ¶ 24.

In her report, Kravtin identifies a number of “inherent shortcomings” with a rate methodology based on avoided or stand-alone costs. She explains, for example, that, at the most basic level, the stand-alone cost approach ignores that, owing to a variety of factors, pole systems cannot be reproduced by cable operators. 35/ It therefore “makes little economic sense to use as ‘cost’ a proxy for an attacher’s hypothetical or stand-alone network since such a network cannot get built.” Kravtin Decl. ¶ 24.

33/ A formula proposed by the U.S. House of Representatives more than a decade ago, but never enacted into law, and that differs significantly from the formula that Congress actually adopted, similarly is of little value to the Commission here. *See* Concerned Utility Comments at 35-36.

34/ *See, e.g., Alabama Cable Television Ass’n*, 16 F.C.C.R. 12,209 at ¶ 53 & ¶¶ 64-70.

35/ Pole attachment license agreements as well as franchise agreements indeed frequently bar cable operators from installing their own poles.

Kravtin also explains that the stand-alone cost approach overlooks that, even if cable operators could install their own poles (which they cannot), it would be far more expensive for them to construct their own networks as an alternative to sharing the utility's existing pole network, and they likely would not do so. *See* Kravtin Decl. ¶ 24. Consequently, as Kravtin explains, “allowing a utility to base its rental charge on its own higher, . . . hypothetical avoided cost to the attachers of stand-alone pole construction . . . would permit the utility to exploit its monopoly ownership of the poles and to extract additional rent from the attacher well in excess of the efficient or actual economic cost of the pole attachment.” Kravtin Decl. ¶ 24. That would be a seriously inefficient outcome, undermining the win-win efficiency of sharing pole resources. *See* Kravtin Decl. ¶ 25.

Coleman Bazelon similarly exposes the flaws with a rate methodology based on stand-alone or avoided costs. *See* Exhibit 1. Bazelon explains that such an approach would allocate too much of the common costs of the pole to cable operators and competitive LEC attachers because the stand-alone costs of a pole to serve the attachers bear no relationship to the value the attachers place on the attachment, or to the amount of space used. Looking at the stand-alone costs for customers to produce a good themselves is a useful way to allocate common costs only where the common costs are relatively small – not where they are the predominant cost of the good. For pole attachments, the common costs of the poles are not only generated primarily by the electric companies and their joint users, but these entities also make much greater use of the space that is used on the pole for attachment, as well as have greater pole attachment

rights. In accord with Kravtin, Bazelon also recognizes that a rate methodology based on stand-alone costs would overstate the value of the pole to a cable attacher.

Accordingly, the Commission should not adopt a rate methodology for broadband attachments that is premised on utility recovery of attachers' stand-alone or avoided costs.

5. *Implementation Of The Telecommunications Rate Is Fraught With Practical Difficulties, And The Utilities' Proposed Modifications Are Unwarranted.*

The Commission should also decline to impose the Telecom Rate on broadband attachments for the simple reason that the formula is overly complicated and involves unusable space variables that are not subject to ready validation. *See, e.g.*, Knology Comments at 7 (explaining that “administrative complexities counsel strongly against the use of the telecommunications formula”). In this proceeding a number of utilities contend that the rebuttable presumptions regarding the number of attaching entities that the Commission has adopted are inaccurate and need to be adjusted downward. This is a familiar issue: “Utilities invariably claim that the average number of attachers is low – often to unrealistically extreme levels.” Knology Comments at 7. Because the utility assertions regarding the number of entities using their poles are often unreliable, cable operators must frequently undertake the expensive and time-consuming process of contesting the utility’s entity data and analysis. *See* Knology Comments at 7. Indeed, some of the same entity data that the utilities put into the record in this very proceeding has already been contested by cable operators. 36/

36/ For example, Tampa Electric Company’s assertion that “the average number of attaching entities in [its] service territory . . . is 2.08,” *see* Comments of FP&L and TECO at 16; Comments of Alabama Power, Georgia Power, Gulf Power &

Given that the entity data that the utilities rely on here are frequently disputed by communications attachers, it would be inappropriate for the Commission to rely on those data as the basis for revising its entity presumptions as part of this proceeding. That required vetting simply cannot take place in the context of this rulemaking, where commenters cannot get behind and reasonably contest the validity of the data. But cable operators know from experience that utilities' entity data frequently cannot be accepted at face value. *See, e.g., Bright House Networks, LLC v. Tampa Electric Company*, File No. EB-06-MD-003; *see also* Knology Comments at 7.

In some cases, the utilities do not limit their entity counts to the poles where cable is present, which they must do under Commission precedent.^{37/} That error alone can drive down the entity average significantly. *See* BHN Reply at 23. Furthermore, utilities often rely on incomplete and faulty attachment records. These records do not correctly reflect all LEC attachments because, as the record in this proceeding amply demonstrates, *see supra* at 36, incumbent LECs do not apply for attachment under joint use agreements.

Mississippi Power at 22-23 (relying on TECO entity data), is the subject of a dispute currently pending before the Commission. *See Bright House Networks, LLC v. Tampa Electric Company*, File No. EB-06-MD-003. The cable operator in that case contested TECO's assertion that it had an average number of attachers just barely above the absolute minimum of attachers allowed by the Commission. *See Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd at 12,134, ¶ 60 ("[W]e include the utility pole owner in the count, resulting in a *minimum of two attaching entities being counted*." (emphasis added)); *see also Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 16 FCC 20,238, 20,242-43, ¶ 11 (Cable Serv. Bur. 2001) ("We have already concluded that the minimum possible number of attachers to be used in the Telecom Formula is two."). It alleged that, at the very least, TECO's poles contained an average of 2.57 entities – a number that the cable operator asserted was still too low. *See* BHN Reply, File No. EB-06-MD-003, at 21-23 (filed April 25, 2006).

^{37/} *See, e.g., Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C. 2d 59, 21 (1979).

Nor do the utilities' records accurately reflect all cable attachments where, for example, drop poles have not been traditionally subject to permitting requirements. ^{38/} By the same token, the utilities often do not include all government attachments, as required. ^{39/}

Given that the utilities' data cannot be accepted at face value, and cannot be adequately tested in this rulemaking proceeding, the Commission should decline to rely on it. This is especially true in light of the fact that the Commission's rules provide utilities with the ability to rebut its presumptions in individual cases. *See, e.g., Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. 12,103, 12,139, ¶ 70 (2001). ("As with all our presumptions, either party may rebut this presumption with a statistically valid survey or actual data."). ^{40/}

^{38/} *See, e.g., Mile High Cable Partners v. Pub. Serv. Co. of Colo.*, 15 F.C.C.R. 11,450 (Cab Serv. Bur. 2000), *aff'd*, 17 F.C.C.R. 6268 (2002), *aff'd Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

^{39/} *See In re Amendment of the Commission's Rules & Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 16 F.C.C.R. 12,103, 12,140, ¶ 72 (2001) ("[W]e set a presumptive average number of attaching entities at five (5) to reflect the inclusion of, but not limited to, the following possible attaching entities: electric, telephone, cable, competitive telecommunications service providers and governmental agencies.").

^{40/} In any event, UTC's contention that the Commission's presumptions lead to the utilities' recovering 11 percent, rather than 16 percent of their pole costs, is problematic. First, many if not most utility poles do not contain third-party attachments. If UTC's recovery percentage includes these poles, the percentage is meaningless. Moreover, UTC overlooks that, as a result of the joint use arrangements that utilities enjoy with telephone companies, they attach to a significant number of telephone-utility owned poles entirely for free. *See UTC Comments at 10.*

The bottom line of the disputes regarding the number of entities used in calculating the Telecom Rate is that such disputes are inevitable because the number of attaching entities is not subject to the discipline of public reporting. ^{41/} The Commission can avoid these disputes and simplify the negotiations for pole owners and attachers alike by relying on the Cable Rate in all cases in which attachments are used for commingled services, including broadband Internet access services. Because most attachments today are used by attachers for broadband Internet access service, the disputes related to the number of entities occupying poles could be largely avoided by relying on the Cable Rate for all such attachments.

Although the Commission need not address the various modifications to the Telecom Rate proposed by the electric utilities, TWC notes that these modifications have

^{41/} See, e.g., *Nevada State Cable Television Ass'n v. Nevada Bell*, 17 F.C.C.R. 15,524, 15,538 (2002) ("It is our intent to conform to the will of Congress and to avoid protracted proceedings, special studies, or *submissions of internal corporate data* to the maximum extent possible.") (emphasis added); *Cavalier Telephone, LLC v. Virginia Electric & Power Co.*, 15 F.C.C.R. 9563, 9573 (Cable Serv. Bur. 2000) ("In order to calculate a reasonable pole attachment rate when the parties to a pole attachment agreement cannot negotiate a reasonable rate, we apply our formula using public data when available."); *Time Warner Entertainment/Advance-Newhouse Partnership v. Florida Power & Light Co.*, 14 F.C.C.R. 9149, 9152 (Cable Serv. Bur. 1999) ("The methodology used to arrive at a pole attachment rate should be simple and, preferably, based upon publicly identifiable and verifiable data."); *Cable Television Ass'n of Georgia v. BellSouth Telecomms., Inc.*, 17 F.C.C.R. 13,807, 13,812-13 (Enf. Bur. 2002) (finding that pole owner could not use internally generated reports for determination of accumulated depreciation, deferred taxes, and expenses); *Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 F.C.C.R. 4387, 4392-94 (1987) ("Our goal is to adopt a formula which, using publicly available data, results in a rate which approaches the maximum level within the just and reasonable charge."); *Television Cable Servs., Inc. v. Monongahela Power Co.*, 88 F.C.C.2d 63, 71 (Com. Car. Bur. 1981), *modified in part*, 88 F.C.C.2d 56 (1981) ("The Commission has previously found that resolution of pole attachment disputes should, so far as possible, rely on data developed for regulatory purposes.").

all been previously argued to the Commission and rejected. The electric utilities propose to modify the Telecom Rate by: excluding the pole owner, incumbent LECs and government entities from the number of actual attaching entities 42/; assigning to attachers the costs associated with the 40-inch “neutral space” 43/; counting overlashing as a separate attachment 44/; increasing the amount of space allocated to cable operators; and including more FERC accounts in the formula. 45/ The Commission has previously rejected each and every one of these proposals. 46/ The utilities offer no new justification warranting the Commission to reverse course now, and there is none.

6. *The Comments Confirm That Incumbent LECs Receive Far Greater Rights Under Joint Use Agreements Than Cable Operators Do Under Pole License Agreements.*

The comments support TWC’s position that it would be inappropriate simply to apply the same rate to cable and incumbent LEC attachers, owing to the fact that incumbent LECs enjoy significantly greater rights under historic joint use agreements than do cable operators under pole attachment license agreements. *See* TWC Comments at 11-18. Numerous commenters make clear that incumbent LECs are not required to pay make-ready expenses like cable operators because utilities install poles of a sufficient

42/ *See, e.g.,* UTC/EEI Comments at 105-106.

43/ *See, e.g.,* PacifiCorp et al. Comments at 18-19; UTC/EEI Comments at 103.

44/ *See, e.g.,* UTC/EEI Comments at 109.

45/ *See, e.g.,* Concerned Utilities Comments at 8-9.

46/ *See* 16 F.C.C.R. at 12,133, ¶¶ 58-59 (counted attachers); *id.* at 12,130, ¶ 51 (communications worker safety zone); *id.* at 12,133, ¶ 58 (overlashing); *id.* at 12,129, ¶ 48 (allocation of space to cable); *id.* at 12,155-164 ¶ 108-128 (FERC accounts).

height to accommodate the space needs of incumbent LECs. ^{47/} Incumbent LECs are also not required to engage in the same time consuming and expensive permitting and pre-attachment-inspection process as cable operators in order to attach to joint use poles, and thus “they can proceed with their roll outs as quickly as they wish without being slowed down by any pole owner.” ^{48/} Under joint use agreements, incumbent LECs are not obligated to incur inspection costs, as are cable operators under pole attachment license agreements. ^{49/} And, unlike cable operators, incumbent LECs do not pay any costs incurred to relocate or rearrange their facilities on the pole paid by other attachers. ^{50/}

The filed comments also make clear that incumbent LECs receive – and indeed use – more pole space than do cable operators. ^{51/} As the Concerned Utilities explain, cable companies and CLECs “generally rent only the one foot of space on the pole that they currently need,” whereas joint use agreements entitle incumbent LECs “to a certain number of feet on the pole, regardless whether they have a current need for that space.” Concerned Utilities Comments at 55. This is a significant benefit: “With the extra space available under joint use, ILECs can expand their facilities with greater ease, plan for

^{47/} See, e.g., Concerned Utilities Comments at 53; FP&L and TECO Comments at 5.

^{48/} See, e.g., Concerned Utilities Comments at 54; FP&L and TECO Comments at 5.

^{49/} See, e.g., Concerned Utilities Comments at 54.

^{50/} See, e.g., *id.* at 55-56.

^{51/} See, e.g., *id.* at 55; EEI/UTC Comments at 52.

emergencies and future needs, and have less need to incur the cost of changing out a pole to meet their requirements.” *Id.*

The comments also make clear that, even if these important rights that incumbent LECs receive under joint use agreements are removed from the equation, it is still impossible to make an “apples-to-apples” comparison of the rates that incumbent LECs complain about and the regulated rates paid by cable operators under pole attachment license agreements. *See, e.g.,* EEI/UTC Comments at 50-51 (“It is difficult to compare the reciprocal compensation arrangements under electric-ILEC joint use and joint ownership agreements with regulated rates under pole attachment agreements between electric utilities and Commission-jurisdictional attachers.”). The annual payments under joint use agreements are not “rental” payments – made by attachers under pole license agreements – but rather “adjustment” payments fundamentally premised on parity of pole ownership. ^{52/} By design, no money is to change hands between the joint users, so long as the parties maintain their share of poles. *Id.*

Because electric utilities have increased their share of pole ownership over time (while incumbent LECs have decreased theirs), however, the electric utilities have taken on more of the responsibility of pole ownership. *See* UTC Comments at 5-6. This affects the reciprocal compensation mechanism in the parties’ joint use agreements because incumbent LECs are required to make up for failing to maintain their share of pole ownership through adjustment costs that are higher than if the incumbent LECs were to maintain their allocated share of pole ownership. *See id.* 5-6. Consequently, the annual

^{52/} Comments of Oncor Electric Delivery Co. at 26; *see also* Comments of Alabama Power et al. at 8; Comments of FP&L and TECO at 5.

rental payments that cable operators and other communications attachers make under pole attachment license agreements and the adjustments that incumbent LECs are required to make under joint use agreements cannot be meaningfully compared.

II. THE UTILITIES' ALLEGATIONS CONCERNING CABLE OPERATORS' UNAUTHORIZED ATTACHMENTS AND SAFETY VIOLATIONS ARE OVERBLOWN AND MISLEADING.

A. Utilities And Other Attachers Routinely Create Safety Violations For Which Cable Operators Are Inappropriately Blamed.

Although electric utility commenters assert that cable operators and other communications attachers create safety code violations on poles, the fact is that the utilities themselves often create safety violations too. It is a regular occurrence for utilities to build cable operators into code violation, then attempt to shift the blame for the violation to the cable operators.

This frequently occurs, for example, where utilities build down on cable as part of constructing electric facilities to deliver electric service to new residential and commercial buildings. *See Arkansas Cable Telecomms. Assoc. v. Entergy Arkansas, Inc.*, EB-05-MD-004, Reply Decl. of M. Harrelson P.E., at 22-25 & 49-52 (filed June 10, 2005), attached hereto as Exhibit 3. In such cases, the cable wires have not moved; instead, the new electric plant is simply placed too close to cable, putting the cable operator's facilities into violation. *See id.* (Indeed, because cable system upgrades are performed by overlashing fiber optic cable on existing attachments, cable attachments initially placed in spec do not typically fall into violation by the cable operator's doing.) In numerous cases, utilities have installed their transformers too close to the cable

operator's wires – a clear NESC violation that the cable operator could not have caused. *See id.* at 26. Yet, despite that the utility has obviously caused such violations, on many occasions the utility attempts to make cable operators pay to correct them.

In one case that ultimately came before the Commission, the utility asserted that TWC put a number of poles into violation of NESC pole-loading requirements as a result of its attachments and attempted to force TWC to replace all of the poles. *See Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, 14 F.C.C.R. 11,599 (Cable Serv. Bur. 1999). When the Commission reviewed the situation, it concluded that TWC's attachment requests served as a "catalyst" for the utility's "discovery that many of its poles did not meet NESC standards even without Time Warner's attachments." *Id.* at ¶ 20. "It appears a number of poles that need replacement violated NESC requirements prior to attachment by Time Warner's facilities" the Commission explained, and that the correction of these pre-existing violations was the utility's – not TWC's – responsibility. *Id.* at ¶ 19.

Utilities' own violations often come to light in the context of utility-initiated "safety" inspections designed to review cable operators' attachments. The design and implementation of these inspections, which are typically conducted by outside contractors rather than utility employees, are often rife with flaws that call the results of these surveys into question. For example, utilities instruct their contractors only to focus on cable plant, rather than on the attachments of all parties on the pole, including the utility itself, in an attempt to avoid shouldering any of the costs associated with the

inspection. A common approach is for the utility and its contractor to presume that if this is a clearance issue *involving* a cable operator facility, it was *caused by* the cable operator.

Moreover, the outside contractors who perform the inspections often cite cable operators for “violations” that are based on new compliance standards adopted for purposes of the inspection itself. These new standards imposed for inspection purposes frequently deviate sharply from well-accepted industry practices, the parties longstanding course of dealing under the pole attachment license agreement, and even NESC standards. The contractors also often cite simple maintenance issues as cable operator “safety violations,” such as broken or missing guy guards. In many cases, the utility or its contractor is often unable or unwilling even to provide the cable operator detailed information supporting its violation findings, making it difficult for the cable operator to understand or correct the asserted violation.

TWC in fact has numerous examples of utilities assigning blame to cable operators in the context of safety audits that were the utility’s own fault:

- In one case, TWC’s expert concluded that in many instances the utility caused TWC’s wires to violate NESC clearance requirements where the utility, in constructing its own broadband over power line facilities, placed its wires too close to TWCs.
- In another case, a utility’s violations included improperly sagged wires, which caused violation of midspan separation requirements between electric and cable wires, as well as the placement of transformers too close to existing cable attachments and failures to place U-guards high enough on the pole when installing risers where there were existing cable attachments.
- In yet another case, many violations were caused by the utility’s failure to maintain the proper separation because the sag in its conductors had increased over time. This utility also attempted to require TWC to correct pole conditions without considering the role played by other pole users:

It sought to require TWC to move its facilities up on a pole to cure an alleged violation of ground clearance requirements, without considering that the telephone utility's wires, which were the lowest facilities on the pole, would remain in violation.

Utilities all too often fail properly to maintain the safety and integrity of their own plant. This not only includes instances like those noted above where the utility simply constructs new facilities out of compliance with NESC requirements, but also more general failures to inspect and maintain existing utility plant. In one case, TWC's engineering expert uncovered many unsafe conditions existing on the utility's poles, including energized conductors and triplex wires placed too close to cable wires and improperly maintained guy wires. And, in *KPC&L*, the utility had overloaded its own poles, but, when TWC was performing an upgrade, attempted to foist the cost of pole replacements onto TWC. ^{53/}

Utilities' failures to maintain their plant are further confirmed by state regulators charged with overseeing utility operations. ^{54/} The Texas Public Utilities Commission's

^{53/} In another case in which TWC was involved, a utility had failed to inspect its own plant for decades, in contravention of a state utility commission requirement that it inspect a significant portion of its plant once a year. When this utility finally undertook an inspection, it attempted to require TWC to absorb the cost. Yet, many of the violations that the inspection uncovered were ones for which the utility itself was responsible. For example, the utility's overhead wires in many cases failed to comply with NESC midspan separation requirements because the utility's facilities had sagged over time and the utility had failed to resag them in order to preserve proper separation. These types of issues would have been uncovered – and hopefully addressed – by the utility had it undertaken the routine inspections it was required to undertake every year.

^{54/} See, e.g., *Report Concerning the 2005 Reliability Performance of Illinois Power Co. d/b/a AmerenIP Pursuant to 83 Ill. Adm. Code 411.140*, Order, 2004 Ill. PUC LEXIS 2, at *94 (2007) (finding “[w]eather was not the cause of many of the interruptions that AmerenIP blamed on it. What is more likely is that AmerenIP had not

investigation of one utility's maintenance programs revealed, for example, that "[t]he record evidence reveals a lack of effective and prudent maintenance policies" as well as "uneven spending in the area of operations and maintenance." *Entergy Gulf States, Inc. Service Quality Issues*, Opinion & Final Order, 1998 Tex. PUC LEXIS 16, at *1 (rel. Feb. 13, 1998). The Texas Commission found serious problems with the utility's maintenance of its pole plant. Among other things, the Commission found that: there were "numerous poles with physical deficiencies," *id.* at 12, that 17.9 percent of poles in eight different areas showed structural decay and that the utility decreased its level of spending for pole and appurtenance replacements by 50 percent during a two-year period. *Id.* at 80. The Commission also found that, by its own admission, the utility "does not have a traditional pole inspection program in place." *Id.* at *14-15.

Sometimes, unbeknownst to the cable operator, another pole attacher moves the cable operator's facilities into code violation. This typically occurs when another communications provider attempts to make room for its own attachment on a given pole by relocating the cable operator's facilities without its knowledge or consent. In one case, for instance, a utility that was constructing its own communications system to compete with TWC routinely relocated TWC's facilities as it built out its network. TWC was forced to sue the utility to stop it from doing so. Similarly, in another case, a BPL provider relocated TWC's facilities and attachments without consent while constructing its network. Again, TWC was required to take steps to have this practice stopped. Obviously, these types of violations cannot be properly attributed to the cable operator.

adequately maintained the circuits and they were just not able, in their deteriorated condition, to withstand the normal forces that nature brought against them.").

In other cases, the utility itself (or its contractors) put the cable attachment into violation by relocating cable facilities during the process of upgrading electric facilities.

B. Alleged Safety “Violations” Supposedly Committed By Cable Operators Frequently Are The By-Product Of Shifting And Discriminatory Standards And Sudden Departures From Accepted Practices.

In many cases, the “violations” alleged by utilities to have been caused by the cable operator are not violations of any recognized safety code requirements. They are instead the product simply of unreasonable interpretations of safety code requirements or refusals to acknowledge rule exceptions or grandfathering principles. *See Harrelson Decl. at 27 & 32-35.* In some cases, the cable operator does not even know what the standards that it will be held to are. *See Harrelson Decl. at 31.* Some asserted violations are premised on newly-minted requirements that exceed NESC requirements that the utility, or more often, its outside contractor, adopted and imposed years after the cable operator made its attachments. *See Harrelson Decl. at 36.* For example, a utility’s contractor may require bonding to every electric ground, placing separate anchors for all guys, maintaining 12-inches of separation between communications wires, and placing guy markers on every pole. *See Harrelson Decl. at 36, 38-39 & 42-43.* Sometimes the utility does not even hold itself, or other attachers, to the same standards that it imposes on the cable operator. *See Harrelson Decl. at 45-60.*

Utility adoption of unreasonable, shifting and punitive interpretations of code requirements are no accident. The Commission must recognize that a utility has a strong profit risk-shifting motives to blame cable operators and other communications attachers for violations on its poles. It provides a means for the utility to force the pole attacher to

pay for upgrades of its own facilities and even to avoid legal responsibility for the deficient condition of its plant. This profit motive in particular was evident in the *KCP&L* case, where the utility sought to have TWC fund a massive rebuild of the utility's pole plant by asserting that TWC's attachments had overloaded the poles. *See Kansas City Cable Partners*, 14 F.C.C.R. at ¶¶ 19-20. The Commission looked at the facts and realized that the utility's claims had no basis. *See id.*

The same motive lies behind many utility "safety" and "compliance" audits. From their very design, these audits are frequently little more than covert attempts to force cable operators to fund system maintenance, upgrades, and otherwise provide utilities with information only valuable for itself. Thus, the audits only focus on alleged cable "violations" in order to require cable operators to absorb the bill under Commission precedent. ^{55/} As part of these audits, utilities also attempt to require cable operators to pay for the utility contractor to gather important mapping data useful for their electric distribution (and BPL) operations, but totally irrelevant to the cable operator. Moreover, the violations that are found often require cable operators to pay to install taller, stronger poles, for which the utility receives a significant financial benefit. *See supra* at 3-4. But in many cases these very violations were caused by the utility building down on the cable facilities, including on poles where there was room for them to satisfy code separation requirements without a pole change out.

^{55/} *See, e.g., Newport News Cablevision, Ltd., Communications, Inc., v. Virginia Elec. & Power Co.*, 7 F.C.C.R. 2610, 2611, ¶ 8 (1992) ("Any costs of an inspection designed only to inspect cable attachments should be borne by the cable company."); *accord First Commonwealth Communications, Inc. v. Virginia Elec. & Power Co.*, 7 F.C.C.R. 2614, 2615, ¶ 8 (CCB 1992).

C. The Utilities Provide No Evidence Of A Causal Link Between Cable Operator Violations And Pole Failures.

Although the utilities make grave claims of safety violations allegedly caused by cable operators, they do not offer any evidence actually linking a cable violation to a system failure. Indeed, the only actual case that any utility invokes in this proceeding does not demonstrate that cable operators create safety hazards; on the contrary, it shows that pole-owning utilities' failures to maintain their poles create dangerous pole conditions. In the case involving Qwest Communications referred to at note 5 of the comments of the Concerned Utilities, the jury found that Qwest – the pole owner – was liable for the collapse of a rotten pole that it had failed to remove from service. *See* Concerned Utilities Comments at 3 n.5 (citing Bob Mook, *Jury Awards Lineman 39M in Qwest Lawsuit*, Denver Business Journal, May 24, 2007). Other cases similar to this Qwest case demonstrate that utilities' own failures to properly maintain their plant lead to extremely hazardous pole conditions causing injury. 56/

56/ See, e.g., *New England Tel. & Tel. Co. v. Reed*, 336 F.2d 90 (1st Cir. 1964) (injury to lineman caused when improperly maintained telephone utility pole broke); *Fleniken v. Entergy Corp.*, 780 So.2d 1175 (La. App. 1st Cir. 2001) (trucker injured when he came in contact with improperly sagged electric distribution line); *Johnson v. Louisiana Power & Light Co.*, No. 98-CA-2271, 199 WL 410226 (La. App. 4th Cir. 1999) (electrocution injury caused by unmarked fallen power line); *Re Southern California Edison Co.y*, Cal. Pub. Utils. Comm'n, 2004 WL 1150966, at *21 (Cal. P.U.C. Apr. 22, 2004) (fining utility for electric line construction, operation, and maintenance practices to the tune of "\$20,000 for each of the 30 violations involving accidents where Edison failed to correct a serious violation in a timely fashion, and \$1,000 for each of 56 [other] violations . . . for failing to identify unsafe conditions for a total fine of \$656,000.").

D. There Is No Reason For The FCC To Superintend Safety Practices Of Cable Operators.

We do not suggest that any party should knowingly create violations of the NESC or that, upon finding such violations, they need not correct them. To the contrary, TWC agrees that all Code violations should be avoided in the first instance and corrected when found. TWC recognizes its responsibility in that regard, and has attempted to work with utility pole owners to ensure that any code violations for which it bears such responsibility are promptly cured. But it is clear that no intervention is required by this Commission to police cable operators' construction or maintenance behavior.

It is telling that the utilities allege safety violations in the context of this rulemaking; indeed, it speaks volumes. Were the utilities' complaints here legitimate, of course, they would not have waited until this proceeding to raise them. They would have insisted that cable operators cure the violations that they caused, or they would have brought complaints to state regulators or this Commission. Of course, the cable operators who believed that the utilities were unfairly blaming them for violations caused by the utilities themselves would then have been able to explore the underlying facts in a proceeding before the FCC or the state commission.

When utility allegations of violations have come before the Commission, however, the facts have often shown that the utilities' allegations were unfounded. In the *KCP&L* case discussed above, for example, the Commission concluded that the utility's claim that TWC's attachments had overloaded the poles was false. *See Kansas City Cable Partners*, 14 F.C.C.R. at ¶¶ 19-20. The Commission determined instead that the utility had overloaded its poles with its own facilities. *See id.* Indeed, in claiming pole violations by

communications attachers, the utilities here rely on cases before the Commission where those very claims are disputed. *See* UTC/EEI Comments at 38.

E. Unauthorized Attachments Alleged By Utilities Are Overstated.

In their initial comments, some electric utilities make sweeping claims of unauthorized attachments by cable operators and other communications attachers. ^{57/} But without any way for those allegations to be scrutinized or contested in this rulemaking proceeding, it would be manifestly inappropriate for the Commission to accept them at face value. For example, EEI and UTC assert that a “survey” conducted by UTC has found that 11 percent of attachments are unauthorized. Comments of EEI and UTC at 33. No detail about such a survey is provided, and neither TWC nor the Commission has any way to gauge its methodology or accuracy. When placed in the context of the many methodological and factual errors in the unauthorized attachment audits with which TWC is familiar, however, it seems clear that the UTC survey has simply compiled the various errors that TWC has experienced with such surveys in the past. *See* TWC Comments at 54-56.

Although they cannot be adequately disputed on a case-by-case basis in the context of this proceeding, utility claims of unauthorized attachments are typically overblown, and their attachment counts are frequently disputed by cable operators. *See, e.g.,* Knology Comments at 15; *see also* *Mile High Cable Partners v. Pub. Serv. Co. of*

^{57/} *See, e.g.,* EEI/UTC Comments at 33-34; Oncor Comments at 12-13; Concerned Utilities Comments at 74; Comments of American Electric Power Serv. Corp., Duke Energy Corp., Entergy Servs. Corp., PPL Elec. Utils. Corp., Progress Energy, Southern Co. & Xcel Energy Serv. Inc. (“AEP”) at 9-18; Comments of FP&L and TECO at 10-12.

Colo., 15 F.C.C.R. 11,450 (Cab Serv. Bur. 2000), *aff'd*, 17 F.C.C.R. 6268 (2002), *aff'd* *Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003). And with good reason. The attachment audits that the utilities (or, more typically, their outside contractors) perform are often seriously flawed and consequently produce wildly inflated numbers of unauthorized attachments. For example, utility contractors operating without detailed system maps sometimes impute attachments made by others (*e.g.*, the incumbent LEC or CLEC) to cable operators or even count attachments made to poles owned by another utility, such as their joint user. Also, some unauthorized attachments result from change in pole ownership: An *authorized* cable attachment on a telephone pole becomes an *unauthorized* attachment – so far as the electric utilities are concerned – once pole ownership is transferred (without the cable operator’s knowledge) to the electric utility.

In the process of conducting attachment audits, the utilities or their contractors also adopt novel and inappropriate definitions of pole attachments that deviate from the parties’ prior practices and industry standards. *See, e.g., Arkansas Cable Telecomms. Assoc. v. Entergy Arkansas, Inc.*, EB-05-MD-004, Reply Decl. Marc Billingsley, at 12 (filed June 10, 2005), attached hereto as Exhibit 4. As Knology explains, “unauthorized [pole] status is often the result of the utility’s retroactive enforcement of a change in its attachment policies.” Knology Comments at 18. Thus, “[i]n a number of instances, utilities have disregarded years of industry practice and company-specific pole attachment policies in order to unilaterally reinterpret what constitutes an attachment to their poles.” As an example of this phenomenon, some utilities have begun to count “J-hooks” or other separate hardware within cable’s one-foot of allocated space as separate

attachments. Utilities or their contractors also have inflated unauthorized attachment numbers by breaking with historic practice to inappropriately count drop pole attachments as “unauthorized.” *See* TWC Comments at 55-58. 58/

Utility findings of unauthorized attachments are also aggravated, in many cases, by the unavailability of pole licensing records. Such records sometimes become unavailable as a result of changes in cable system ownership. In other cases, utilities themselves fail properly to maintain attachment records. Findings of unauthorized attachments are further aggravated by utilities’ offering financial incentives to their contractors to find unauthorized attachments by paying them on a per-attachment basis. *See* Knology Comments at 15.

The issue of unauthorized attachments represents a further important contrast between the rights that incumbent local exchange carriers receive under historic joint use agreements and those that cable operators receive under pole attachment license agreements. As the comments make clear, joint users frequently do not give any notice to the other party of their attachments. *See supra* at 36. Thus, unlike cable operators who routinely face claims – and associated charges – for allegedly making unauthorized attachments, for incumbent LECs unauthorized attachments are a non-issue.

58/ Pole audits that involve these types of practices ineluctably produce findings of many unauthorized attachments. In one case, for example, a utility claimed that the cable operator operating a mature cable system had made more than eight hundred miles worth of unauthorized attachments in a two-year span – a most improbable feat. Similarly, in another case, TWC disputed one utility’s attempt to impute unauthorized attachments to TWC going back more than twenty-five years – a period during which the utility performed no plant audits at all.

F. The Commission Should Reaffirm That Overlashing May Go Forward Without Specific Advance Permitting.

The Commission has recognized that overlashing is the engine by which new services are brought to cable and competitive LEC customers and that there are no safety or other issues that require the overlashing of a cable to an existing aerial strand to be separately permitted. ^{59/} Yet, several of the electric utility commenters argue that the Commission should reverse its policy and require cable operators to go through a full permitting process before overlashing. ^{60/} In particular, EEI and UTC assert that overlashing “can significantly increase the wind and ice load.” Comments of EEI and UTC at 23. Based on several tables and figures that EEI and UTC include in their comments, they suggest that adding an additional cable can have a significant effect on pole loading – and ergo, according to them, “the utility needs to have an opportunity to perform an engineering analysis before the additional cable is overlashed.” *Id.* at 25.

^{59/} See *Amendment of Commission’s Rules Governing Pole Attachments*, 16 F.C.C.R. 12,103, 12,141, ¶ 75 (2001) (“We affirm our policy that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.”); See also *Implementation of Section 703(E) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules & Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6807, ¶ 62 (1998) (“We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure facilities.”); see also *Common Carrier Bureau Cautions Owners of Utility Poles*, Public Notice, DA 95-35 (Jan. 11, 1995) (warning utility pole owners against imposing restrictions of cable operators seeking to overlash their own attachments).

^{60/} See, e.g., UTC Comments at 37-38; EEI/UTC Comments at 24-25, 74-75.

The EEI and UTC analysis is misleading and insufficiently explained. For one thing, their reliance on a “10 degree line angle,” as if the pole were not guyed on the reverse side of that angle, is unrealistic and would violate general construction standards. All parties are required by the NESC to place guys on their attachments “[w]hen the loads are greater than can be supported by the structure alone.” ^{61/} The Lucent Engineering Handbook specifies that parties should guy their attachments where the angle is greater than 3½ degrees. And we are aware of electric utility company standards that require, as a general rule, that guys be placed on any corner exceeding 2 degrees for three phase systems and exceeding 4 ½ degrees for single phase systems. So the EEI and UTC analysis of loadings of 5 and 10 degrees can be dismissed.

The EEI and UTC analysis for angles of 3 degrees or less shows that adding an additional cable to a strand or bundle at 18 feet above ground would add a “wind moment and a tension moment” in the range of 3 percent or less of the pole’s capacity. ^{62/} For example, the second to last line in Figure 1 in the EEI and UTC Comments (at page 26) shows that overlashing an additional cable to a single existing cable in a “Light Loading Zone” raises the percentage of pole capacity used from 8% to 11% – a difference of 3%

^{61/} The NESC provides:

When the loads are greater than can be supported by the structure alone, additional strength shall be provided by the use of guys, braces, or other suitable construction. Such measures shall also be used where necessary to limit the increase of sags in adjacent spans and provide sufficient strength for those supports on which the loads are sufficiently unbalanced, for example, at corners, angles, dead ends, large differences in span lengths, and changes of grade of construction. [National Electrical Safety Code § 264(A) (IEEE 2007).]

^{62/} TWC does not accept that the EEI/UTC windloading charts are fully accurate, but they are close enough to illustrate the points we make here.

of the pole's total load capacity. And increasing an existing bundle already containing two cables, raises the percentage of total load capacity by an additional 2%. Similarly, Figure 3 (at page 28 of the Comments) shows that overlashing a cable to an existing bundle of two cables in a "Heavy Loading Zone" increases the cable bundle's use of the pole's loading capacity by 1%—from 10% to 11%. Overlashing a cable to an existing bundle already containing three cables uses an additional 2% of the pole's loading capacity—from 11% to 13%.

It is evident, therefore, that overlashing another cable to an existing attachment does not significantly affect the safety conditions on a pole – bearing out the Commission's assumption when it decreed that utilities may not delay cable operators' overlashing through a pre-overlash permitting procedure. ^{63/} The context of overlashing, moreover, demonstrates that overlashing must be assumed to be a safety non-event. Utilities almost universally in their pole attachment agreements reserve the right to conduct post-construction safety inspections, for which they charge the cable operator. They also have the right and ability to conduct post-construction inspections following overlashing, and one must assume that they conduct wind and ice-loading analyses in conjunction with adding their own facilities to the poles, and that the incumbent LEC

^{63/} See *1998 Implementation Order*, 13 F.C.C.R. at 6808-09, ¶ 64 ("We have been presented with no persuasive reason to change the Commission's policy that encourages overlashing, and we agree with representatives of the cable and telecommunications industries that, to the extent that it does not significantly increase the burden on the pole, overlashing one's own pole attachment should be permitted without additional charge.").

joint users do so as well. ^{64/} In other words, assuming the utility has conducted continuing inspections of its plant as facilities have been added over the years, the poles should have sufficient load capacity for the overloading of an additional cable operator fiber. *At worst*, adding an additional fiber would cause a very occasional pole to exceed the NESC requirements by 3%, a minor violation that could be caught and soon corrected via the utility's post-construction inspection.

III. POLE OWNERS SHOULD NOT BE VESTED WITH THE UNILATERAL RIGHT TO IMPOSE PENALTIES ON CABLE OPERATORS FOR ALLEGED SAFETY VIOLATIONS AND UNAUTHORIZED ATTACHMENTS.

Electric utility commenters request the Commission to confer on them the unilateral authority to impose penalties on communications attachers for code violations or unauthorized attachments. ^{65/} For multiple reasons, the idea of vesting the utilities with the power to play judge, jury and executioner for pole violations is deeply troubling, and the Commission should reject this ominous request.

A. Utilities Frequently Allege That Cable Operators Have Caused Violations For Which They Are Not Responsible.

As detailed above, *see supra* at 39-50, utilities frequently attempt to assign to cable operators pole violations caused by other pole attachers, including the utilities themselves. These violations are often alleged in the context of utility-initiated safety

^{64/} That the utilities may not always do so, as apparent from their failures to maintain their own plant within safety standards, *see supra* at 39-46, cannot be used as a basis for requiring that cable operators wait to overlash until the utility gets around to conducting an inspection of its plant to be certain that the plant is not already out of NESC compliance.

^{65/} *See, e.g.*, Comments of Portland General Electric Co. at 8; Concerned Utilities Comments at 77-78; EEI/UTC Comments at 76-80.

audits that are targeted to uncover supposed cable “violations.” Yet these inspections are often flawed; they ignore violations caused by other attachers and are performed by outside contractors using newly created “safety” standards that deviate from the parties’ historic practice, industry standards and code requirements. As a result of these utility practices, utility allegations of cable violations often lead to disputes, some of which have come before this Commission. ^{66/}

In addition, there are many exogenous factors that lead to non-code-compliant plant over which pole attachers like cable operators simply have no control. For example, cable facilities sometimes come into violation of NESC clearance requirements as a result of new construction – such as a driveway installation – that raises the underlying ground height, making the cable wires closer to the ground than before, or increases the code requirement for the line. ^{67/} While such situations must be redressed by adjusting the cable to meet clearance requirements, it would be inappropriate to penalize the cable operator for a safety violation that it played no part in creating – and was not even aware of. In other cases, weather and normal wear and tear lead to plant falling out of spec. While these situations need to be addressed, they are properly labeled maintenance issues, not safety violations. And in yet other cases, other attachers create violations for which

^{66/} See, e.g., *Arkansas Cable Telecomms. Assoc. et al. v. Entergy Arkansas, Inc.*, EB-05-MD-004; *Knology, Inc. v. Georgia Power Co.*, 18 F.C.C.R. 24,615 (2003); *See Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, 14 F.C.C.R. 11,599 (Cable Serv. Bur. 1999).

^{67/} See, e.g., National Electrical Safety Code, Table 232-1 (IEEE 2007) (height of insulated communication conductors and messengers required to be 9.5 feet above spaces subject to pedestrian traffic only but required to be 15.5 feet above driveways).

the cable operator is not properly held responsible. Indeed, as noted above, utilities themselves create violations on poles by, for example, the installation of new electric facilities. These issues too need to be addressed, but again are not properly classified as safety violations for which the cable operators should be held responsible – or penalized.

B. Authorizing Utilities To Fine Cable Operators For Alleged Safety Violations Is A Recipe For Abuse That Would Undoubtedly Cause An Outbreak Of Litigation.

TWC explained in its initial comments that utility poles are utility assets that are indispensable to cable operators and over which the utilities wield monopoly control. *See* TWC Comments at 18-25. As evident from hundreds of cases decided by this Commission, the utilities have time and again abused that control. *See also* Comcast Comments at 8-12. The Commission would only make matters worse by vesting the utilities with the authority to unilaterally sanction cable operators for alleged pole violations. Giving pole owners the additional power to penalize cable operators at will would afford them even greater leverage over cable operators. That additional leverage would invite abuse.

Vesting utilities with the power to penalize cable operators would also undoubtedly trigger a new epidemic of pole attachment litigation. In view of the above discussion, *see supra* at 39-50, it is clear that allegations of safety violations are not a simple, administrative matter. Quite to the contrary, such allegations arise in a complex factual setting, which may often involve actions undertaken by multiple parties over the course of many years affecting an organic and evolving environment. As such, judgment calls about who is or is not at fault for a given pole condition are often hotly disputed.

Such disputes, many of which already ultimately come before the Commission, would be aggravated by stacking the threat of financial penalties on top of already significant repair costs.

C. The Commission Has Ample Authority To Fully Address – And Remedy – Safety And Unauthorized Attachment Issues In Fact-Specific Adjudications.

The Commission also should decline to give the utilities the power to unilaterally penalize pole attachers for violations on the theory that doing so will reduce alleged violations. The incentive to avoid such financial penalties already exists; the Commission itself may impose sanctions on utilities or attachers for egregious abuses. As the Commission has recognized, it has “broad authority to fashion remedies in pole attachment complaint proceedings.” *Knology, Inc. v. Georgia Power Co.*, 18 F.C.C.R. 24,615, 24,640, ¶¶ 54-57 (2003); *see also id.* (invoking authority to impose “expansive remedies”). ^{68/} In doing so, the Commission may rely on Section 503 of the Communications Act, which allows it to impose sanctions for “willfully or repeatedly fail[ing] to comply with any of the provisions of the Act or any rule, regulation or order issued by the Commission.” 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(b); *id.*

^{68/} *See also Nextar Broadcasting, Inc.*, 20 F.C.C.R. 18,160 (2005); *Cavalier Telephone, LLC v. Virginia Elec. & Power Co.*, Order & Request for Information, 15 F.C.C.R. 9563, 9579, ¶ 42 (Cable Serv. Bur. 2000), *vacated by settlement*, 2002 FCC LEXIS 6385 (Dec. 3, 2002) (stating the vacatur did “not reflect any disagreement with or reconsideration of any of the findings or conclusions contained” in the original order issued in 2000); *Cable Tex., Inc. v. Entergy Serv., Inc.*, Order, 14 F.C.C.R. 6647, 6653, ¶¶ 18-19 (Cable Serv. Bur. 1999).

§ 1.1410(c). ^{69/} The Commission should not give the utilities the same power in this proceeding.

D. In Any Event, Cable Operators Should Have An Opportunity To Cure Actual Safety Violations Before Any Penalties Are Imposed.

In any case, cable operators are entitled to notice of any safety violations and sufficient time to cure the violations before any sanctions are imposed. *See, e.g.,* Comments of Portland General Electric Co. at 8; Concerned Utilities Comments at 77-78; EEI/UTC Comments at 76-80. Such an approach is fully consistent with the Oregon model lauded by the electric utilities. Under Oregon's pole attachment regulations, a utility may not sanction an attacher if the attacher submits a plan to correct the violation within 60 days of receiving notice of the violation and if the attacher corrects the violation (and provides notice of the correction) within 180 days of receiving notice of the violation. *See* Oregon Admin. R. 860-028-0150(3); *see also id.* 860-028-0120(5). And utilities may not penalize attachers for violation that are discovered in a joint post-construction inspection, so long as the attacher corrects the violation within 60 days. *See id.* 860-028-0150(5)(b). ^{70/}

^{69/} The utilities are aware of and invoke these provisions frequently against cable operators. *See, e.g., See Bright House Networks, LLC v. Tampa Electric Company*, File No. EB-06-MD-003., Tampa Electric Company's Response to Pole Attachment Complaint of Bright House Networks, LLC at 33-35 (filed Mar. 29, 2006).

^{70/} Oregon's regulations also contain procedural mechanisms for pole attachers to contest violations alleged by a utility. *See id.* 860-028-0170; 860-028-0210; 860-028-0220.

Furthermore, any sanctions for safety violations must apply evenly to all attaching parties, including the pole owner and joint user. We have described above some of the many situations with which TWC is familiar where safety violations have been created by the pole owner itself. If any sanctions were permitted, they must not be payable to the utility, would need to be applied even-handedly, and made applicable to the pole owners and joint users themselves where those entities do not correct safety violations for which they have responsibility after reasonable notice.

IV. THE COMMISSION SHOULD REAFFIRM ITS PRECEDENT CONCERNING TERMS AND CONDITIONS OF POLE ACCESS.

A. The Commission Should Reaffirm That Pre-Attachment Licenses Are Not Required For Drop Poles.

The Commission has repeatedly held that cable operators are not required to obtain licenses for drop poles prior to attachment. *See Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, 22 F.C.C.R. 20,536, 20,543-44, ¶¶ 24-25 (2007); *Mile High Cable Partners, L.P.*, 15 F.C.C.R. 11,450, ¶ 19 (Cab. Serv. Bur. 2000). The comments support TWC's position that this rule remains sound. *See* TWC Comments at 57; *see also* Comments of segTEL, Inc. at 12-13. The commenters explain that utilities commonly do not require communications attachers to obtain permits before making drop pole attachments and that, moreover, the practice is a competitive imperative. ^{71/} Without the ability to make attachments before obtaining permits, communications

^{71/} *See* Knology Comments at 18; Joint Comments of Alpheus Communications, L.P. & 360Networks (USA), Inc. at 3; Wow! Comments at 5-6; Comments of Fibertech Networks, LLC & Kentucky Data Link, Inc. at 29-31.

providers would not be able to deliver service to their customers in a timely manner. ^{72/} The commenters further explain that drop pole attachments do not pose any significant safety, reliability, or engineering issues. ^{73/} The Commission should therefore reaffirm in this proceeding that attachers are not required to obtain permits prior to making drop pole attachments.

B. The Commission Should Reaffirm Its Existing “Sign And Sue” Rule.

Despite utility calls for the Commission to eliminate or modify the sign and sue rule, ^{74/} the comments make clear there are good reasons for the Commission to retain the rule – which has been upheld in court – as is. *See* Knology Comments at 10 (citing *Southern Co. Serv. v. FCC*, 313 F.3d 574, 582-84 (D.C. Cir. 2002)); *see also* NCTA Comments at 23; Comcast Comments at 43. The comments reaffirm what the Commission has consistently recognized, ^{75/} that the parties to pole attachment agreements do not negotiate from equal bargaining positions, and thus cable operators

^{72/} *See* Knology Comments at 18; Joint Comments of Alpheus Communications, L.P. & 360Networks (USA), Inc. at 3; Comments of Wow! Internet Cable & Phone at 5-6; Comments of Fibertech Networks, LLC & Kentucky Data Link, Inc. at 29-31.

^{73/} *See* WOW! Comments at 6; Fibertech Comments at 30.

^{74/} *See, e.g.,* PacifiCorp et al. Comments at 32-34.

^{75/} *See Selkirk Comm., Inc. v. Florida Power & Light*, 8 F.C.C.R. 387, 389 ¶ 17 (1993) (“Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company.”); *Heritage*, 6 F.C.C.R. at 7105, ¶ 31 (acknowledging “superior bargaining position utilities typically enjoy over cable operators in negotiating the rates, terms and conditions for pole attachments”).

(for whom poles are essential facilities) are frequently required to acceded to onerous and unreasonable utility terms in order to make vital pole attachments. *See* NCTA Comments at 23; Knology Comments at 10; Comcast Comments at 42. The rule thus (a) provides an important check on utility abuses of their inherently superior bargaining power which interferes with communications attachers' abilities to deploy services and (b) encourages pole owners to negotiate in good faith. *See* NCTA Comments at 23; Comcast Comments at 42-43.

Communications commenters also correctly note that imposing arbitrary time limits to challenge a pole attachment term or condition is inappropriate because a given term may not be unreasonable on its face, but become so through a utility's later interpretation or application. *See, e.g.* Comcast at 44-45. Thus, an artificial deadline to challenge unreasonable terms would lead to greater litigation over pole attachment license agreement terms, because cable operators would be forced to litigate over terms that may not even be enforced simply because they may, in some hypothetical future applications, be unreasonably applied or interpreted. *See* Knology Comments at 11; Comcast Comments at 45. Such litigation "over hypothetical disputes," as Knology states, "would be a waste of resources for attachers, utilities, and the Commission." By the same token, if utilities knew that all they had to do was wait out an artificial timetable "monopoly abuses would be rampant." Comcast Comments at 45.

Finally, the comments explain that, under Section 224, the Commission is obligated stamp out unjust and unreasonable terms and conditions of pole attachment whether or not a pole license agreement permits the practice. *See* Knology Comments at

11-12. For all of these reasons, the Commission should decline to modify or eliminate a rule that is “one of the great successes of the Commission’s pole attachment regime.” NCTA Comments at 23.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in TWC’s initial comments, the Commission should advance its broadband mandate by declining to raise pole attachment costs vital to cable operators’ delivery of advanced communications services to subscribers at affordable rates. The Commission should therefore adopt the Cable Rate as the appropriate rate for pole attachments used for broadband Internet access service. The Commission should reject the Telecom Rate or any other higher, punitive rate suggested by the electric utilities. The Commission has discretion to adopt the Cable Rate for cable operators and CLECs. That rate contains no subsidy for attaching parties or their subscribers, and the rate more than fully compensates utilities for the costs they incur in allowing third-party attachments to their poles.

Additionally, the Commission should dismiss the allegations made by electric utilities concerning unauthorized attachments and safety violations by third-party attachers. Utilities themselves regularly create safety violations, for which cable operators are often inappropriately blamed. The claims the electric utilities present here are overblown and inaccurate and cannot be verified. The utilities’ allegations also result from their arbitrary and unexplained departures from prior practices, unreasonable interpretations of code standards, and novel rules for counting attachments, as TWC knows quite well. In any event, the electric utilities are unable to present any evidence

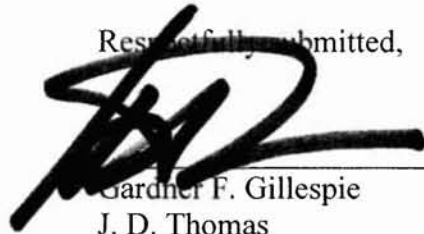
remotely demonstrating any connection between alleged violations and pole failures. Moreover, the Commission should reaffirm, as it has many times before, that overloading is a practice vital to achieving the pro-competitive goals of the 1996 Telecommunications Act, and that attachers may overload their own facilities without undertaking advance permitting requirements.

The Commission should also refuse to allow utilities to unilaterally impose financial penalties on cable operators for alleged unauthorized attachments and safety violations. Giving utilities such power would inevitably lead to abuses and increase litigation before the Commission and elsewhere. The Commission itself is the appropriate body to police third-party attaching practices, and it is clearly vested with authority to impose sanctions in egregious cases. If the Commission nevertheless were to sanction cable operators, such sanctions must not be payable to the utilities and any sanctions procedure must provide cable operators the opportunity to cure alleged violations before any sanctions may be imposed.

Finally, the Commission should reaffirm its key precedents regarding terms and conditions of attachment. It should therefore reaffirm that cable operators are not required to obtain pre-attachment licenses before making attachments to drop poles, because such a requirement would needlessly delay cable operators' timely delivery of service to subscribers. Moreover, the Commission should reaffirm its sign and sue rule

as is; the arbitrary timeframe that the Commission proposes to place on cable operators' exercise of their rights under Section 224 is inconsistent with that statute and would carry untoward consequences.

Respectfully submitted,

A large, bold, handwritten signature in black ink, appearing to be "G. Gillespie", is written over the typed name and partially over the firm name.

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